TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 220.

WILLIAM S. ELDER, AS ADMINISTRATOR OF THE ESTATE OF RUFUS WILSEY, DECEASED; ELIZABETH WILSEY, ET AL., PLAINTIFFS IN ERROR,

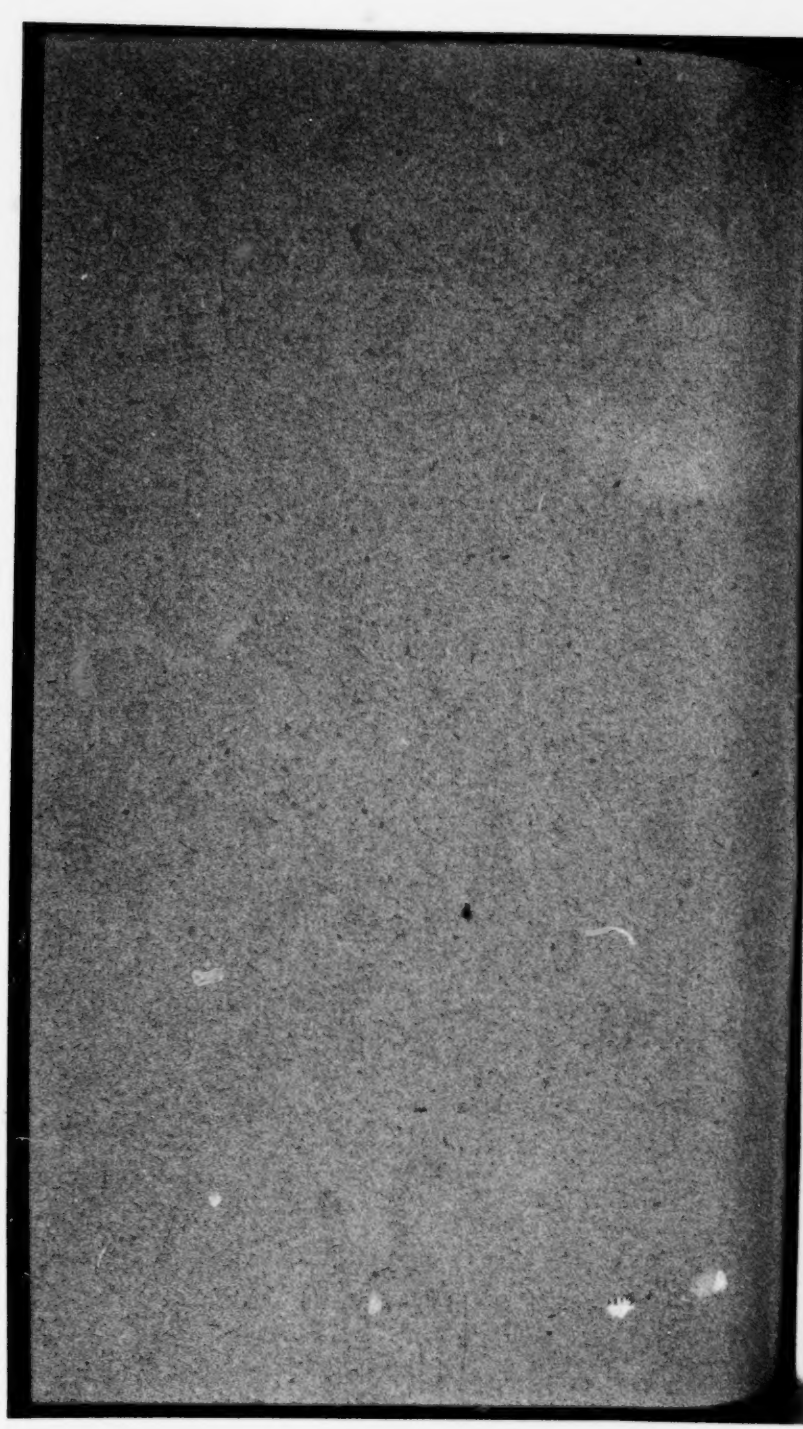
vs.

THE HORSESHOE MINING AND MILLING COMPANY; JOSEPH M. THOMAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED FEBRUARY 13, 1903.

(18,838.)



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* * * * * * *

a-2 *Complaint.*

Plaintiffs complain and allege:

1. That during the year 1879, one Rufus Wilsey, hereinafter referred to, died interstate in Lawrence county, Dakota, being at the time of his death a resident of said county and Territory; that on the 8th day of July, 1881, one John M. Stephens was duly appointed as administrator of the estate of said Rufus Wilsey, deceased, by the probate court of Lawrence county, and thereupon duly qualified and entered upon the discharge of the duties of his office as such administrator; that thereafter the said John M. Stephens, deceased, and such proceedings were had that on the 12th day of August, 1893, the above named William S. Elder was by the county court of Lawrence county, South Dakota, duly appointed as administrator of the estate of said Rufus Wilsey, deceased, in the place and stead of the formed administrator of the said estate, and he thereupon duly qualified and entered upon the discharge of his duties as such administrator, and is still such administrator and acting as such; the plaintiffs, Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey and Frank Wilsey, are the heirs at law and the only heirs at law of the said Rufus Wilsey, deceased.

2. Upon information and belief that the defendant, The Horseshoe Mining and Milling Company is a corporation, duly organi-ed and existing under and by virtue of the laws of the State of South Dakota.

3. Upon information and belief that on or about the 21st day of January, 1878, the said Rufus Wilsey and C. H. Havens, citizens of the United States, and persons fully qualified to locate,
3 claim and obtain title to the mineral lands of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States, in the county of Lawrence, Territory of Dakota, and duly located and appropriated under the mining laws of the United States and of the Territory of Dakota, the Golden Sand lode or mining claim, three hundre-(300) feet in width by fifteen hundred (1500) feet in length; twelve hundred feet thereof extending southwesterly from the discovery shaft, and three hundred (300) feet northeasterly from the said shaft, the said lode and mining claim being situated on the divide between Middle Deadwood gulch and a branch of Spearfish creek, about two thousand (2000) feet east of the Portland lode and about five (5) miles from Poorman gulch. Location certificate whereof is recorded in Book 9, page 62, in the office of the register of deeds of Lawrence county, South Dakota; the discovery shaft being about forty (40) feet from Bear Gulch trail, in Whitewood Quartz mining district, Lawrence county, now in the State of South Dakota; that the said

Rufus Wilsey, at the time of his decease in the year 1879 was seized and possessed of an undivided one-half (½) interest in and to the said Golden Sand lode or mining claim, and the plaintiffs are now the owners and entitled to the possession of an undivided one-half (½) interest in said property.

4. Upon information and belief that the said Rufus Wilsey and C. H. Havens, during the lifetime of the said Rufus Wilsey, did and performed all work and labor required under the laws of the United States and of the Territory of Dakota for the development and holding of said property and the protection and perfection of title thereto; performing for every year improvement and development work upon said property of the value and to the extent of at least one hundred dollars ($100) per year. That since the decease of the said Rufus Wilsey, up to and including the year 1891, the proper
4 amount of labor and development work in the sum and to the value of at least one hundred dollars ($100) per year has been done and performed upon the said property by the said C. H. Haven, and all things required under the laws of the United States and of the Territory of Dakota and the State of South Dakota to perfect and protect title to said property has been done and performed from time to time as required by law; and the Golden Sand claim was during the year 1892 and all times before and since a valid and subsisting mining claim.

5. Upon information and belief that on or about the 10th day of August, 1892, the said C. H. Haven assumed to sell to the defendant, Thos. H. White, and the defendant, The Horseshoe Mining and Milling Company, the said Golden Sand mining claim and lode for the sum of five thousand dollars ($5000) and the said defendants, Thos. H. White and The Horseshoe Mining and Milling Company, assumed to purchase the said Golden Sand claim from the said C. H. Haven, paying the said C. H. Haven the sum of five thousand dollars ($5000) therefor, and taking deed of conveyance of said property from C. H. Haven in the name of the defendant, Thomas H. White, which said deed of conveyance was on the 31st day of August, 1892, recorded in Book 64, page 390, of the records of the office of register of deeds of Lawrence county, South Dakota; that at the time of the said purchase and the said conveyance neither the said Rufus Wilsey nor his heirs or administrators had disposed of nor parted with an undivided one-half (½) interest in said property belonging to the said Rufus Wilsey and to his estate, and the said C. H. Haven had no right or authority to sell or dispose of the undivided one-half (½) interest in the said claim, belonging to the plaintiffs, or any portion thereof, of all of which the defendant-, Thomas H. White and The Horseshoe Mining and Milling Company had notice.

5 6. That prior to the commencement of this action the plaintiffs duly tendered to the defendant-, Thomas H. White and The Horseshoe Mining and Milling Company, one-half (½) of the expenditures made by the said defendants, or by their grantors upon the said property, for the purpose of doing and performing the annual assessment and development work upon the said property at

all times since decease of the said Rufus Wilsey, which tender and offer was declined by the defendants. These plaintiffs now offer to pay the said defendants one-half (½) of any and all sums so expended by the said defendants or either of them in the protection, development and preservation of said property.

7. That notwithstanding the said Golden Sand lode and mining claim was during all of the year 1892 and at all times from the date of its location aforesaid, and is now a valid, subsisting mining claim, and not subject to relocation or forfeiture; that, nevertheless, the plaintiffs complain upon information and belief that on or about the 22nd day of August, 1892, the defendants, Thomas H. White and The Horseshoe Mining and Milling Company, for the purpose, if possible, of depriving the plaintiffs of the undivided one-half interest in and to said mining claim and property wrongfully and without right, made an attempted location and appropriation of the said Golden Sand lode or mining claim by attempting to locate a pretended mining claim, known as the "North" lode or mining claim, over and upon the identical ground embraced within the boundary lines of the said Golden Sand claim, making said attempted and pretended location in the name of one Joseph M. Thomas, a relative of Thomas H. White, and now as then in the employ of the said defendant that in attempting to make said "North" location the said parties made no new discovery, but simply adopted the discovery of the said Golden Sand claim, and
6 also adopted the stakes of the said Golden Sand claim, and on the 10th day of September, 1892, filed for record in the office of the register of deeds of Lawrence county, South Dakota, a pretended location certificate of the said "North" claim; that all of the said acts of the defendants and each of them were done entirely without the knowledge of these plaintiffs, or either of them, that at that time the former administrator of the estate of Rufus Wilsey, deceased had deceased, and the appointment of the present administrator had not been made; that all of the plaintiffs, except the administrator, are now and have been at all times during the periods alleged in this complaint non-residents of the State of South Dakota and of the Territory of Dakota; a portion of them residing in the eastern part of the State of Iowa, and one of the plaintiffs is residing in another Western State; that in the said pretended location notice and certificate the defendants made no mention of the fact that the pretended North location is a relocation of the said Golden Sand lode or mining claim.

Plaintiffs further allege upon information and belief that the defendant, Thomas H. White and The Horseshoe Mining and Milling Company, then proceeded with all haste to make an entry of the said "North" claim in the United States land office at Rapid City district, South Dakota, and entered the same and received receaver's receipt therefor on or about the — day of ——, 1893, taking the said receiver's receipt in the name of said Joseph M. Thomas; that all of said acts were done and performed by the defendants without the knowledge of these plaintiffs or either of them; none of the

plaintiffs became aware of the said fact until after the completion of the said entry and the issuance of the said receiver's receipt, and that the said acts in this complaint referred to were each and all done by the said defendants for the purpose of, if possible, wrongfully and without right depriving these plaintiffs of their
7 undivided one half interest in and to said Golden Sand claim or lode; that on the 29th day of November, 1893, the said defendant, Thomas H. White and The Horseshoe Mining and Milling Company, caused a deed of conveyance of the said North lode to be acknowledged, executed and delivered by the defendant, Joseph M. Thomas, to the defendant, The Horseshoe Mining and Milling Company, and on the 29th day of November, 1893, the said defendants caused the deed to be filed for record in the office of the register of deeds of Lawrence county, South Dakota, and the record title of said property is now standing in the name of the defendant, The Horseshoe Mining and Milling Company.

8. That if these plaintiffs had known or could have ascertained that the application of the defendants for patenting the North lode or mining claim was for the property embraced within the boundaries of the Golden Sand lode or mining claim, these plaintiffs would have protested against and adversed the said application of the defendants for patent to the said North lode and mining claim, but the defendants by concealment of the fact that the North claim was an attempted location of the Golden Sand lode or mining claim, and by their other acts of concealment of their attempt to deprive the plaintiffs of their interest in said property, have prevented the plaintiffs from knowing that the defendants were seeking title to the Golden Sand lode or mining claim. If the defendants, by their conduct in this behalf, should be permitted to hold the whole of the said North lode or mining claim in their own right and against the interests of the plaintiff, it would work a great fraud and irreparable hardship and injury upon the rights of the plaintiffs in and to the said undivided one-half interest in said property.

9. That prior to the commencemant of this action the
8 plaintiffs tendered to the defendants, Thomas H. White and The Horseshoe Mining and Milling Company, one-half of any and all expenses incurred by the said defendants, or either of them, in locating and improving the ground embraced in *in* the said North lode or mining claim, and also one-half of the expenses of entering the said land for patent, at the same time requesting a deed for an undivided one-half interest in the said property, and the said defendants declined to accept the said tender, and refused to execute to the plaintiffs, or any of them, a deed for any interest in said property; that the plaintiffs are still willing and able, and offer in this court to repay to the defendants one-half of any and all expenses or expenditures incurred or made by the defendants, or either of them, in the said behalf.

10. That there are claims amounting to several hundred dollars existing against the estate of the said Rufus Wilsey, deceased, which have been allowed, and that the only property out of which the

same or any portion thereof can be paid is the interest of the estate in the said Golden Sand lode and mining claim, there being no other property left belonging to said estate.

Wherefore plaintiffs pray judgment.

(1.) That the defendant, The Horseshoe Mining and Milling Company, be decreed to hold in trust for the plaintiffs an undivided one-half interest in and to the land embraced in the said North lode or mining claim, and that it be decreed to convey to the plaintiff, William S. Elder, administrator of the said estate, an undivided one-half interest therein by good and sufficient deed, or to the plaintiffs, as the court may see just and proper. (2) For costs. (3.) For such other and further relief as may be just and equitable. (Verified)

Transcript p. 4–12.

Answer.

Now come the defendants in the above entitled action,
9 and by leave of court makes this their answer to the complaint of the plaintiffs herein.

1. As to each and every of the statements and allegations contained in paragraph one, of this complaint, these defendants deny that they have any knowledge or information sufficient to form a belief.

2. These defendants admit that the Horseshoe Mining and Milling Company is a corporation, as alleged in paragraph two, of the complaint.

3. As to each and every of the statements and allegations contained in paragraph three, of said complaint, these defendants deny that they have any knowledge or information sufficient to form a belief, except that whatever may be the facts as to the statements and allegations therein contained, these defendants expressly deny that the plaintiffs are now the owners or were at the time of the bringing of this action the owners, or entitled to the possession of an undivided one-half interest in the alleged Golden Sand lode, or that either of said plaintiffs was or is an owner or entitled to the possession of the same or any part thereof.

4. As to each and every of the statements and allegations contained in paragraph four, of said complaint, these defendants deny that they have any knowledge or information sufficient to form a belief.

5. These defendants admit that on or about August 10, 1892, C. H. Havens sold to the defendant, Thomas H. White, for his co-defendant, The Horseshoe Mining and Milling Company, not then created but in contemplation, whatever right, title or interest the said C. H. Haven had in the said so-called Golden Sand lode or mining claim, for the sum of $5,000, and that the said defendant, Thomas H. White, for his co-defendant aforesaid, purchased the same of the said C. H. Havens and paid him therefor the said sum of
10 $5,000, and thereupon took a deed of conveyance therefor from the said C. H. Havens in the name of Thomas H. White,

which was an ordinary deed of grant, bargain, sale and quit claim, and which was recorded on the 31st day of August, 1892, in Book 84, at page 390, of the records in the office of the register of deeds of Lawrence county, South Dakota; but these defendants deny that at the time of the said purchase and the said conveyance the said Rufus Wilsey, or his heirs or any administrator assuming to act for his estate, had an undivided one-half interest, or any interest whatever, in said so-called Golden Sand lode, or that the said C. H. Havens had no right or authority to sell or dispose of said undivided one-half interest, so claimed by plaintiffs, but allege the fact to be that if the said so-called Golden Sand lode or mining claim was in any particular a valid or subsisting mining claim, (as to which, as before stated, these defendants deny that they have any knowledge or information sufficient to form a belief) nevertheless, the said C. H. Havens was, at the time of his sale in the sole, exclusive and undisputed possession of the whole thereof, claiming and asserting in himself the sole title thereto, and that he had good and lawful right to the whole and to each and every portion thereof, and authority to sell and convey the same, and that the plaintiffs had no right, title or interest therein; and these defendants further allege in this connection and in this behalf upon their information and belief, that long prior to any purchase by defendant, Thomas H. White, from C. H. Havens, of the said so-called Golden Sand lode or mining claim, or the right, title or interest of said C. H. Havens therein, to-wit, from the years 1880 to 1888 inclusive, the same was claimed to be the joint property of C. H. Havens and one Rufus Wilsey, (but as to the sufficiency or legality of their claim these defendants, as before stated, deny that they
11 have any knowledge or information sufficient to form a belief) and that during each and every of said years the said Rufus Wilsey failed to contribute his proportion or any proportion, sum or amount whatever, of the expenditures required to hold the same as a located mining claim, or to do or perform any part or portion whatever of the $100 worth of labor required to be performed annually upon a located mining claim, and that the said C. H. Havens, during said years, did and performed such work and labor, and contributed the same annually to the extent of $100, and upon the failure of said Rufus Wilsey to contribute any proportion thereof, as aforesaid, the said C. H. Havens gave to him, his heirs, and administrator, and to whom it might concern due notice by publication in the newspaper published nearest the claim, to-wit, in the Belt Herald, published in Lead City, Lawrence county, for at least once a week for ninety days, claiming a forfeiture by the said Rufus Wilsey of his alleged interest in said so-called Golden Sand lode or mining claim, for a failure to contribute his proportion of the expenditures required by law upon said claim during the year aforesaid, to-wit: that said C. H. Havens published a notice claiming a forfeiture as against said Rufus Wilsey for his failure to do or contribute his proportion of said work for and during the years 1880 to 1887 inclusive, in the said Belt Herald for and during the period of ninety

days, from January 2, 1889, to April 2, 1889, inclusive, and also published in said paper a further notice claiming a forfeiture against said Rufus Wilsey for his failure to contribute his share or proportion of the work during the year 1888, which notice was published in the paper aforesaid for and during a period of ninety days, from January 2, 1889, to April 2, 1889, inclusive, and that affidavits of such publications were duly made by A. W. Merrick, as publisher of said paper, and were filed for record on the 31st day of
12 May, 1889, and duly recorded in the office of the register of deeds of Lawrence county, in Book 51, at pages 637 and 638; that after April 2, 1889, the period of ninety days expired from and after the conclusion of such publication, and the said Rufus Wilsey failed and neglected to contribute any proportion of the expenditures required by law or by the said notice; and on the 25th day of August, 1892, the said C. H. Havens made affidavit to such fact, and the same was duly filed for record on that day, and duly recorded in the office of the register of deeds in and for Lawrence county, and that upon the expiration of said ninety days after April 2, 1889, and the failure of said Rufus Wilsey to respond to said notice or contribute any share or proportion of said expenditures, then and thereupon, if the said so-called Golden Sand lode or mining claim ever was a valid mining claim, or the said Rufus Wilsey ever had any interest therein, it became the property of his alleged co-owner, C. H. Havens, who claimed to have made the required expenditures, and that under and by virtue of said notice and the proceedings had by C. H. Havens in and about the same, the said Rufus Wilsey, if he ever had any interest whatever in said so-called Golden Sand lode or mining claim, wholly forfeited the same to said C. H. Havens, and the said C. H. Havens acquired thereto such title and interest as the said Rufus Wilsey might theretofore have had therein, and thereafter had good right to sell and convey the same, and these defendants expressly deny that they ever had any notice to the contrary.

6. These defendants deny that prior to the commencement of this action, or at any time the plaintiffs, or either of them, duly or otherwise tendered to the defendant, Thomas H. White, or the Horseshoe Mining and Milling Company, one-half of the expenditures made by these defendants or by anyone else upon said so-called Golden Sand lode or mining claim, for the purpose of doing or per-
13 forming annual assessment or development work upon said alleged Golden Sand lode since the alleged decease of Rufus Wilsey, but admit that they served upon defendants an offer in writing of that purport and effect, which was declined by defendants.

7. These defendants deny each and every of the stat-ments and allegations contained in paragraph seven, of the plaintiff's complaint, and the unnumbered paragraph immediately following, except as herein admitted, and in lieu thereof state the facts regarding the matters referred to in said seventh and further paragraph to be as follows: That after the purchase of the so-called Golden Sand lode or mining claim by the defendant, Thomas H. White, from the

said C. H. Havens without any waiver of whatever rights might have been acquired by said purchase as against the said C. H. Havens or against said Rufus Wilsey and the plaintiffs, the said Thomas H. White voluntarily relinquished and abandoned the so-called Golden Sand lode and mining claim, and the same became a part of the public domain, and thereupon one Joseph M. Thomas, a relative and friend of Thomas H. White, and then in his employ, located thereover and of substantially the same area the North lode and mining claim, on the 22nd day of August, 1892, and on the 10th day of September, 1892, filed for record a certificate of location of the same in the office of the register of deeds of Lawrence county and thereafter an application for patent therefor was duly made and such proceedings had, that on or about the 3rd day of May, 1893, the said North lode was duly entered for patent at the United States land office at Rapid City, S. D., and thereafter, in confirmation of said entry and in pursuance thereof, the patent of the United States for said North lode, as mineral lot No. 914, duly issued to said Joseph M. Thomas September 20, 1893, and that on the 29th
14 day of November, 1893, the said Joseph M. Thomas duly executed and delivered to the defendant, The Horseshoe Mining and Milling Company, a deed for said North lode and mining claim, which was on the same date filed for record in the office of the register of deeds of Lawrence county, and the said Joseph M. Thomas had no longer any right, title or interest in or to said property, or in this controversy, and that the foregoing, as these defendants verily believe, constitute the acts of which plaintiffs make complaint; but that the plaintiffs, and each of them, had full notice of said proceedings by the said defendants, and were chargeable by law with notice thereof. These defendants admit that the plaintiffs, other than William S. Elder, are non-residents of the State of South Dakota, and they are informed and believe that said plaintiffs, other than William S. Elder, are residents of the State of Iowa; they further admit the location notice and certificate of the North lode, made no mention that it was a relocation of the Golden Sand lode or mining claim, and they are advised that it was not necessary that they should make such mention.

8. As to each and every of the statements and allegations contained in the further and following paragraph of the plaintiff's complaint, also numbered seven, these defendants deny that they have any knowledge or information sufficient to form a belief.

9. These defendants deny that prior to the commencement of this action the plaintiffs tendered to the defendant, Thomas H. White, or The Horseshoe Mining and Milling Company, one-half of any or all expenses incurred by them or either of them, in locating and improving the ground embraced in the said North lode or mining claim, or one-half of the expense of entering the same for patent, and deny that they tendered the plaintiffs, or either of them, any sum of money whatever, but admit that a paper purporting
15 to contain an offer of that tenor and effect was served upon said defendants, together with a request for a deed, which

offer these defendants declined to accept, and also declined to execute a deed, for that they were under no duty to execute the same.

10. As to each and every of the statements and allegations contained in paragraph nine, of the plaintiffs' complaint, these defendants deny that they have any knowledge or information sufficient to form a belief, but they allege that if the said Rufus Wilsey be dead, as claimed, and any claims whatever have been filed against his estate, that they are inconsiderable and insignificant, and have long ago been abandoned or relinquished, and that the alleged ap-ointment of William S. Elder, as administrator for him, as alleged, was not induced or procured by creditors or claim holders, or in their interest, but wholly by the other plaintiffs in this action, or parties aiding or abetting them in bringing and maintaining the same, and that his alleged appointment as administrator, whether duly or otherwise made, was for the sole purpose of instituting this action against these defendants, and that said William S. Elder had no right, title or interest whatever in or to the property in controversy in this action, as administrator or otherwise, and no right to bring or maintain such action by or in his own name, or as administrator or in connection with his co-plaintiffs.

11. These defendants further allege, by way of defense to this action that if the said Rufus Wilsey, or the plaintiffs alleged to be his heirs, if he be dead, ever had any right, title or interest in the Golden Sand lode or mining claim whatever, nevertheless the same was forfeited and wholly lost to them and became the property of C. H. Havens, for a failure to contribute any proportion of the annual work and expenditures upon the said so-called Golden Sand
16 lode and mining claim during the years 1880 to 1888 inclusive, and under and by virtue of the proceedings taken thereupon by the said C. H. Havens in publishing a notice of such failure and forfeiture in the newspaper published nearest to the said claim, as hereinbefore fully recited and set forth.

12. These defendants further allege by way of a further defence to this action, that if the said Rufus Wilsey ever had any right, title or interest of any kind whatever in or to the said so-called Golden Sand lode or mining claim, or if the sand plaintiffs, alleged to be his heirs, if he be dead, ever had any right, title or interest in or to said so-called Golden Sand lode or mining claim, which they could under any theory of fact or law at any time assert as against these defendants, and the patent issued for the North lode or mining claim, yet, nevertheless, they, by their long silence, laches and neglect have lost and forfeited the same, and their claim has become stale through their own fault and omission, and they ought not now be allowed to present or assert the same.

13. These defendants further allege, by way of a further defence to this action, that the defendant, The Horseshoe Mining and Milling Company, is now the owner in fee simple of the North lode and mining claim, mineral lot No. 914, by virtue of the patent of the United States therefor, bearing date the 20th day of September,

1893; that the same was procured in due course of law, and that the plaintiffs made no protest, adverse claim or objection against the issuance thereof, and that they are now barred from objecting thereto or asserting any claim thereunder, and that they ought not to be allowed at this time to present or assert any claim against said patent or in or to the same and that their said complaint is wholly without equity or any showing of just grounds for relief as against these defendants or either of them.

17 Wherefore these defendants ask to be hence dismissed with their costs. (Verified.)

Transcript p. 14-23.

The court having announced his decision in favor of defendants, thereupon made and signed the following as his decision:

This action coming on to be heard before the court April 29, and May 2, 3, 4 and 5, 1898, the plaintiffs, appearing by their attorneys, Messrs. Martin & Mason and Frank McLaughlin, and the defendants, by their attorneys, Edwin Van Cise and G. C. Moody, and the court having heard the evidence and proofs adduced and argument of counsel, now finds and decides in favor of the defendants, and makes and files this, its decision, in the action.

Findings of Fact.

1. On or about January 21, 1878, Rufus Wilsey and Charles H. Havens, being citizens of the United States, located a mining claim near Bald mountain or Green mountain, in Whitewood mining district, Lawrence county, S. D., by discovering mineral bearing rock in place, sinking a discover- shaft, posting discovery notice and planting boundary stakes. On May 13, 1878, they caused to be filed for record their location certificate and the same was then recorded. After the Deadwood fire this was re-recorded November 14, 1879, in Book 9, page 62, of the records in the register of deeds office of Lawrence county. Its contents were as follows:

"Know all men by these presents: That we, the undersigned, have this 21st day of January, 1878, claimed by right of location fifteen hundred feet linear and horizontal measurements in length, and three hundred feet in width on the 'Golden Sand' lode, along the vein thereof, with all its spurs dips, variations and angles, together with the amount of surface necessary for working the same and allowed by law; twelve hundred feet of said lode so located and being southwesterly

18 of the discovery shaft on said lode, and three hundred feet being northeasterly of said shaft. Said lode being situated *in* supposed in Whitewood mining district, the location and bounds of said claim being marked and described more particularly as follows, to-wit: On the divide between Middle Deadwood gulch and a branch of Spearfish creek, about two thousand feet east of the 'Portland' lode or deposit, about five miles from Poorman gulch, the

discovery shaft about forty feet from Bear Gulch trail, one stake at discovery shaft, four corner stakes, two middle line stakes, two center end stakes with name of lode or deposit and date of location, and relative positions of stakes written on the same, supposed in the county of Lawrence and Territory of Dakota.

RUFUS WILSEY.
C. H. HAVENS.

Attest: WILLIAM M. PRATT.

2. After the location Rufus Wilsey wrote to some of the members of his family, plaintiffs in this case, all then and since residing at Keokuk, Iowa, that he had located a gold mine in the Black hills and had been offered a big price for it, but would not sell. On the 12th of June, 1878, Rufus Wilsey died, and was buried at Deadwood June 14, 1878. Shortly thereafter his family, plaintiffs in this action, were informed of his death by letters from friends, and also by receipt of a paper published either at Deadwood or Central City, bearing date June 13, 1878. The heirs (plaintiffs) knew that Rufus Wilsey had left property, and from a time shortly after his death corresponded with different attorneys and others residing in the Black hills to try to get something out of the estate, but until the arrangement was made with attorneys under which this action was brought, made no progress toward a settlement.

3. On June 19, 1878, Charles H. Evans was appointed
19 special administrator of the estate of Rufus Wilsey, deceased, by the probate court in and for Lawrence county, and the same day took the oath of office and entered upon the discharge of his duties.

4. On June 7, 1879, Charles H. Evans filed in said probate court his petition for letters of regular administrator, alleging that Rufus Wilsey had died intestate in Lawrence county, leaving real estate in said county, the value of which was unknown to petitioner, for the reason that it consisted of mining property, and that deceased had no heirs in the county. On June 19, 1879, Evans was appointed administrator, and the same day took the oath and filed a bond, which was approved, and he then entered upon the duties of his office.

5. On June 21, 1880, a bill of J. M. Stephens and W. T. Lowing for work done on the Golden Sand mine, located on Green mountain, on or about the first day of September, 1878, amounting to $60, and verified by Stephens, was allowed by Administrator Evans, and on September 3, 1880, was approved by the county judge at $50, and filed.

6. On January 19, 1880, a bill of C. H. Havens for "one-half the yearly assessment for labor done on the Golden Sand quartz mine or claim by C. H. Havens, $50" was verified by him before the county judge, and on the same day allowed by the latter and filed. The affidavit alleged that the work was done during the years 1879 and 1880 to hold the location, and such work was in fact done.

7. On July 5, 1881, John M. Stephens filed a petition for appoint-

ment as administrator, alleging that Evans had removed from the Territory and that petitioner was a creditor. The letters of Evans were on the same day revoked, and on August 13, 1881, Stephens was appointed, and filed his bond and oath, and entered upon his duties as administrator. On September 10, 1881, Chas.
20 Johnson, Andrew Craig and J. W. Burns were appointed appraisers to appraise the estate of Rufus Wilsey, deceased, and returned as their inventory and appraisement September 13, 1881, the "Golden Sand mine, near Bald mountain, $350." This return was verified the same day and filed in the probate court. The estate of Rufus Wilsey, deceased, has never had any property except such interest as it has claimed in the property in litigation in this action.

8. On July 31, 1893, Elizabeth Wilsey, widow of Rufus Wilsey, deceased, by Frank McLaughlin and Martin & Mason, her attorneys, filed a petition verified by Frank McLaughlin, and also accompanied by an affidavit of Elizabeth Wilsey, requesting the appointment of William S. Elder as administrator. The petition alleged that John M. Stephens was not a surviving relative of deceased, and not entitled to letters as against the surviving wife, and asked that the letters to Stephens should be revoked. On the 12th day of August, 1893, a supplemental petition on behalf of the widow, by the same attorneys, and verified by Frank McLaughlin, was filed, alleging upon information and belief the death of John M. Stephens and a vacancy in the administration, William S. Elder was thereupon appointed administrator, by order of the county court, on August 12, 1893, and filed his bond and oath. Letters were issued to him bearing that date, and he has since been the qualified and acting administrator.

9. During each and every of the years 1880 to 1888, inclusive, Charles H. Havens continued a co-owner in the Golden Sand lode and mining claim, and did at least $100 worth of labor and improvements upon the same for the purpose of holding possession of the same under the law.

10. On January 2, 1889, it being then and since the practice and custom to record affidavits of such character in Lawrence county, Charles H. Havens filed for record an affidavit made by him
21 that day, and the same was duly recorded in Book 51, at page 567, of the records in the register of deeds office of Lawrence county, as follows:

"TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

C. H. Havens, being duly sworn, says that he has performed labor and expended in labor and improvements $800 upon the Golden Sand lode or claim, in Whitewood Quartz mining district, Lawrence county, D. T., said claim being located on the divide between Middle Deadwood gulch and a branch of Spearfish creek, about two thousand feet east of Portland lode or deposit, about five miles from

Poorman gulch, the discovery shaft about forty feet from Bear Gulch trail; that said labor was done and expenditure made at the rate of $100 per year during the respective years ending December 31, 1880, 1881, 1882, 1883, 1884, 1885, 1886 and 1887, and that said expenditures were made by C. H. Havens, a co-owner of said claim, for the purpose of holding said claim in the above years.

C. H. HAVENS.
C. H. HAVENS.

Subscribed and sworn to before me this 2nd day of January, 1889.

ADONIRAM J. PLOWMAN,
[SEAL.] *Notary Public.*"

On the same day Charles H. Havens verified and filed for record an affidavit of like form that he had done $100 worth of work upon said Golden Sand lode for the year ending December 31, 1888, and such affidavit was duly recorded in Book 51, at page 566, of said records.

11. On May 31, 1889, it being then and since the practice and custom to record such instruments in Lawrence county, Charles H. Havens caused to be filed for record in the office of the register of deeds of said county an affidavit of Albert W. Merrick, publisher of the Belt Herald, accompanied by a notice headed "Notice
22 of forfeiture," and the same were recorded in said office in Book 51, at pages 637–8, as follows:

Affidavit of Publisher.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Albert W. Merrick, of said county and Territory, being first duly sworn on his oath, says: That the Belt Daily Herald is a daily newspaper of general circulation, printed and published in Lead City, in said county and territory, by A. W. Merrick, and has been such newspaper during the times hereinafter mentioned, and that I, Albert W. Merrick, the undersigned, am the publisher of said newspaper, in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; and that the affidavit headed notice of forfeiture, a printed copy of which is hereunto attached, was printed and published in the said newspaper for ninety successive issues, at least once a week for ninety days, the first publication being made on the 2nd day of January, 1889, and the last publication on the 2nd day of April, 1889; that the full amount of the legal fee for the publication of the annexed notice, to-wit, $12, inures solely to the benefit of the publisher of the Belt Daily Herald; that no arrangement or understanding for a division

thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever.

ALBERT W. MERRICK.

Subscribed and sworn to before me this 15th day of May, 1889.

[SEAL.] WALTER E. SMEAD,
Notary Public, Lawrence County, Dakota.

Notice of Forfeiture.

To Rufus Wilsey, his heirs, administrators, and to all whom it may concern:

You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode, said lode being described as follows: On the divide between the Middle Deadwood
23 gulch and a branch of Spearfish creek, about 2,000 feet east of the portland lode or deposit, about five miles from Poorman gulch, the discovery shaft about 40 feet from Bear Gulch trail, supposed to be in Whitewood Quartz mining district, in Lawrence county, D. T., as will appear by certificate filed on January 2, 1889, in the office of the register of deeds of said Lawrence county, in order to hold said premises under the provisions of the laws of the United States and of this Territory, that being $100 per year, the amount required to hold the claim for the years ending December 31, 1880, December 31, 1881, December 31, 1882, December 31, 1883, December 31, 1884, December 31, 1885, December 31, 1886, and December 31, 1887. And if within ninety days after this notice by publication you fail or refuse to contribute your proportion ($400, being $50 for each of said years) your interest in said claim will become the property of the subscriber under section 2324, Revised Statutes of the United States.

C. H. HAVENS."

On the same day Havens filed a like affidavit of Merrick, accompanied by a like notice, claiming for the $100 worth of work done on said Golden Sand lode during the year ending December 31, 1888, and such affidavit was recorded in Book 51, at page 638.

11. At the time of the publication of these notices the Belt Herald was a daily newspaper of general circulation published in Lead City, Lawrence county, then Territory of Dakota, now the State of South Dakota, and was the newspaper published nearest the Golden Sand lode and mining claim. And the notices just referred to and one set out in full, were published in each daily issue of such paper (every day of the week except Sunday) beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889, and no more, but Mr. Merrick was misled into making the affidavit as he
24 did by following the entry in his books instead of examining the files of the paper, and by the fact that the advertisement

was charged in his books upon a page whose top date was January 2, 1889, although later down the page and preceding this charge a date of January 3, 1889, was interlined.

12. After the publication of these notices Charles H. Havens continued to work upon the Golden Sand lode and mining claim, and with the help of his son did in each of the years 1889, 1890, 1891 and 1892, at least $100 worth of work and improvement upon said claim; for the purpose of holding and maintaining the possession thereof. On September 25, 1890, for a stated consideration of $50, Charles H. Havens executed a grant, bargain and sale deed to the Deadwood Central Railroad Company for a strip of land fifty feet wide across the Golden Sand lode for use for railroad purposes and for right of way, reserving the minerals and right to extract the same. This deed was recorded September 26, 1890, in Book 78, at page 278, of the records in the register of deeds office of Lawrence county. On December 8, 1890, for a stated consideration of $125, Havens made a like deed of a fifty foot strip to the Freemont, Elkhorn & Missouri Valley Railroad Company. This deed was recorded December 19, 1890, in Book 78, at page 340, of the same records. On December 12, 1891, Havens made a like deed for a fifty foot strip to the Grand Island & Wyoming Central Railroad Company for a stated consideration of $75, and this deed was recorded December 21, 1891, in Book 87, at page 42, of the same records. On August 10, 1892, Havens made a grant, bargain and sale deed of the whole Golden Sand lode and mining claim to Thomas H. White for a stated consideration of $5,000, and on August 31, 1892, this deed was filed for record and recorded in Book 84, at page 390, of the same records.

25 13. On August 25, 1892, Mr. White caused to be filed for record an affidavit of Charles H. Havens, subscribed and sworn to before White as a notary public, in the same month, but day of the month omitted from his jurat, which recited that he was one of the locators of the Golden Sand lode, and that Rufus Wilsey, his co-owner, and whom he had advertised out for not contributing his proportion of labor for the purpose of holding said claim, had not paid his proportion or any of said expenditure for holding said claim. And said Wilsey and his heirs, plaintiffs in this action, failed to contribute such proportion, and did not prior to December 5, 1893, offer to contribu-e any part of it.

14. At this time Thomas H. White was acting as the local representative of some persons who subsequently formed the Horseshoe Mining and Milling Company, and this purchase was made with funds furnished by them for said company, their corporation then being in contemplation and afterwards formed with White as general manager. After the purchase by White he caused the claim to be relocated as the North lode in the name of his nephew, Joseph M. Thomas, adopting the same boundaries as those of the Golden Sand, and on the 22nd day of August, 1892, caused a certificate of such location as the North lode, signed by Joseph M. Thomas, and bearing that date, to be filed for record in said register of deeds office,

and the same was duly recorded in Book 83, at page 65, of said records of Lawrence county. About the same time Thomas and another person were put to work upon the claim, and ran during that fall and winter about 200 feet of tunnel and drift upon the claim. The said Joseph H. Thomas had no actual interest in the said property or in the said proceedings; but his name was used by Thomas H. White, and the proceedings taken in the interest of the de-
26 fendant corporation afterwards formed, and expenditures and disbursements were made by or on behalf of the said corporation. In making the location of the "North" lode no new discovery was made, and no staking of the claim as the "North" claim was made, and the old stakes of the "Golden Sand" claim were not remarked as new stakes; no notice of discovery of the so-called "North" claim was at any time posted upon the claim, and the location certificate of the "North" lode made no mention of the fact that it was a relocation of the "Golden Sand" lode or of any other claim. (The foregoing beginning with the words "In making the location, etc.," and thence to the end of the paragraph is excepted to by counsel for the defendants.)

15. On September 26, 1892, Messrs. Martin & Mason wrote and mailed from Deadwood to Edward Wilsey, the representative and agent of the heirs of Rufus Wilsey, deceased, plaintiff in this action, all at that time and also on January 2, 1889, being 21 years of age and over, and consisting of Elizabeth Wilsey, the widow, and the following sons: Edward Wilsey, George W. Wilsey, Charles L. Wilsey and Frank Wilsey, a letter, received by said Edward Wilsey in the ordinary course of mail, as follows:

"The Golden Sand, in which your father was interested, has recently been sold, as you probably have been already advised. We think it quite possible that the proceedings taken to advertise your interest out of this property are not valid, and could be set aside should you care to bring suit for that purpose.

Very truly, MARTIN & MASON."

16. On December 14, 1892, Mr. White caused the North lode to be surveyed for an application for patent. The survey was approved by the surveyor general January 28, 1893. The notice and diagram were posted February 10, 1893, not on this claim, but on a mining claim immediately adjoining, known as the "Beaver Frac-
27 tion" claim, within a few feet of the "North" Lode line and a short distance from the public highway; the application for patent sworn to the same day, publication begun shortly thereafter, and other proceedings had, so that on May 3, 1893, the claim was entered for patent as lot No. 914, in the name of Joseph M. Thomas, at the United States land office at Rapid City, and receiver's receipt issued to him in pursuance thereof. The various acts of the defendants in connection with the relocation of the "Golden Sand" claim under the name of the "North" lode, and the survey and entry of the same for patent, and all proceedings in connection therewith, were done and had without the actual knowledge of the

plaintiffs or either of them. (The foregoing from the words "The various acts of the defendants" and thence to the end of the paragraph is excepted to by counsel for defendants.

17. On July 1, 1893, articles of incorporation of the Horseshoe Mining and Milling Company were prepared, and on July 7, 1893, a charter or certificate of incorporation from the secretary of state came to said company at Deadwood, and it has since been engaged in the mining business in Lawrence county. On September 20, 1893, the patent for the North lode was issued to Joseph M. Thomas. It was filed for record September 18, 1894, and recorded in Book 100, at page 451, of the records in the register of deeds office of Lawrence county. On November 20, 1893, Joseph M. Thomas made his deed for a stated consideration of one dollar of all his right, title and interest in the North lode, lot No. 914, to the Horseshoe Mining and Milling Company, which was filed for record November 29, 1893, and duly recorded in said office in Book 97, at page 153.

18. On or about June 15, 1893, the heirs of Rufus Wilsey, deceased, plaintiffs in this case, arranged with their attorneys for a consideration of one-half of whatever should be realized from the estate, to bring this suit and prosecute as far as necessary to
28 effect a recovery of the interests of the estate, the heirs to contribute $100 toward the costs and expenses, of which they have paid $10. On June 15, 1893, four of the heirs, Elizabeth Wilsey, George W. Wilsey, Frank Wilsey and Edward Wilsey, executed their deed to Frank McLaughlin for an undivided one-fourth interest in the Golden Sand lode, which deed was filed for record October 30, 1894, and recorded in Book 97, page 361, of the records in the register of deeds office of Lawrence county.

19. On December 5, 1893, the plaintiffs, by their attorneys, served on Thomas H. White and the Horseshoe Mining and Milling Company an offer in writing to pay $700 for annual development and assessment work done by said White and said company, or their grantors, and if that was not the correct amount expended for the protecting of the half interest in the Golden Sand lode then to pay the full amount done by them or their grantors for the protection of such half interest, and asking a receipt; also offering to pay one-half of the expense of the location and entry of the North lode, and demanding a deed for such half interest. The offer and compliance with the request were refused. This action was begun by the service of summons December 6, 1893.

20. Subsequent to July, 1889, processes for the successful treatment of Bald Mountain ores, including such ore as was found in the ground in controversy, were introduced in Lawrence county, and works for their application and use erected in said county, and as a consequence value of mining property in the vicinity of Bald Mountain, including the claim in controversy, were materially enhanced, and said claim was of much greater value in August, 1892, and December, 1893, than at any time in 1889 or prior thereto.

Conclusions of Law.

1. The Golden Sand lode was on June 12, 1878, a valid mining claim, and that on that day, on the death of Rufus Wilsey, a one-half interest passed to his heirs, named in the complaint in this action, and the other half was in Charles H. Havens, as co-owner.

2. The heirs of Rufus Wilsey, plaintiffs as aforesaid, having failed to contribute their proportion of the expenditures required by law, upon the Golden Sand lode, for the years 1880 to 1888, inclusive, were delinquents under the statute, and Charles H. Havens *os* co-owner, having performed the labor and made the improvements, he was entitled to give such delinquent co-owners notice thereof, and the notices published by him in the Belt Daily Herald, a newspaper published nearest the claim, for at least once a week for ninety days, were such notices as are authorized and contemplated by law, and were published as provided by law, and the failure of said delinquent co-owners (plaintiffs in this action) to contribute their proportion of the $900 called for by said notices, within ninety days after such publication, operated at the expiration of such period, to-wit, July 6, 1889, to divest the interest of said delinquent co-owners and their interest in the Golden Sand lode and mining claim thereupon became the property of Charles H. Havens.

3. The assertion of title to the whole of the premises in controversy by Charles H. Havens from and after July 6, 1889, was such as to put the heirs (plaintiffs in this action) on inquiry and give them notice; Thomas H. White succeeded to the title and possession of the whole by his deed from Havens, and thereafter held adversely to said plaintiffs; and his abandonment of the property and location of it as the North lode, in the name of his nephew, and subsequent entry and patent in his name, was not in any manner a wrong or fraud upon said plaintiffs, and their failure to adverse the application for patent precludes them from assailing such entry and patent; and there is no relation of trust between them and defendants, nor any ground for declaring a trust in their favor.

4. The plaintiffs, heirs at law of Rufus Wilsey, deceased, have been guilty of such gross laches and unexcused neglect in reference to the property in controversy, and such delay in the assertion of any right or interest therein, as must operate as a bar to the maintenance of this action.

5. The deed of Joseph M. Thomas to the Horseshoe Mining and Milling Company vested the title to the whole of the North lode and the ground in controversy, in said company, unaffected by any equity in favor of plaintiffs.

Let judgment and decree be entered in favor of defendants accordingly, for a dismissal of the complaint upon the merits, and for the costs of this action.

By the court,

JOSEPH B. MOORE, *Judge.*

Judgment.

This action having been brought on to be heard upon the regular call of the calendar upon the issues joined by the complaint and answer, Messrs. Martin & Mason and Frank McLaughlin appearing for plaintiffs, and Edwin Van Cise and G. C. Moody appearing for defendants, and the court having heard the evidence and proofs adduced, and argument of counsel, and having made and filed its decision in favor of the defendants, and being fully advised in the premises: now, therefore, on motion of the attorneys for the defendants:

It is ordered, considered, adjudged and decreed, that the plaintiffs take nothing by this action, but that their complaint be and the same is hereby dismissed upon the merits of the action.

31–33 It is further ordered, considered and adjudged that the defendants have and recover of and from the plaintiffs the costs of this action, taxed at $—.

Done in open court this 18th day of August, 1898.

By the court,

JOSEPH B. MOORE, *Judge.*

* * * * * * *

34 & 35 In the Supreme Court, State of South Dakota.

Be it remembered, that at a term of the supreme court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of October, A. D. 1901, on the 2nd day of the term, to-wit: on the 2nd day of October A. D. 1901.

Present: Howard G. Fuller, presiding judge, and Dighton Corson and Dick Haney, judges of said court, the following proceedings were had, and the following judgment was entered, to-wit:

36 File No. 1342.

In the Supreme Court, State of South Dakota, October Term, A. D. 1901.

Present: Howard G. Fuller, presiding judge, Dighton Corson and Dick Haney, judges of said court, and the officers thereof.

WILLIAM ELDER, as Administrator, ET AL., Plaintiffs and Appellants,

vs.

HORSESHOE MINING AND MILLING COMPANY ET AL., Defendants and Respondents.

This action coming on to be heard at the October A. D. 1899 term of this court, at the supreme court room, in the city of Pierre, State of South Dakota, upon the merits of the appeal without oral argument and the court having advised thereon and *and* filed its decision in writing.

It is considered, ordered and adjudged, that the judgment of the circuit court within and for Lawrence county, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, that this action be and is hereby remanded to said circuit court for further proceedings according to law and the decision of this court.

And it is further ordered and adjudged, that respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at eighty six & 15/100 dollars.

All of the judges concurring.

By the court,

[SEAL.]

H. G. FULLER,
Presiding Judge.

Attest: FRANK CRANE, *Clerk.*

37 STATE OF SOUTH DAKOTA, } ss:
County of Hughes, }

I, Frank Crane, clerk of the supreme court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of judgment of the supreme court of the State of South Dakota, in the above entitled action, wherein William Elder, as administrator, *et al.*, — plaintiffs and appellants, *versus* Horseshoe Mining and Milling Company, *et al.*, defendants and respondents, as the same now remains of record in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 17th day of December A D. 1902.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE, *Clerk,*
By D. H. SMITH, *Dep'y.*

Costs and disbursements taxed and allowed as follows:

Costs.

Before argument	$5 00
For argument	15 00
Making and serving case	
Term fees (— terms at $5.00)	

Disbursements.

Clerk's fees to perfect appeal record	
Stenographer's fees to perfect appeal record	
Printing brief (54 pages)	54 00
Printing abstract	
Printing additional abstract	
Fees clerk supreme court, beyond amount paid by appellants	11 90
Notary for this affidavit	25
Total	$86 15

38 [Endorsed:] (File No. 1342.) In supreme court, State of South Dakota. October term, 1901. William S. Elder, *et al.*, plaintiffs and appellants, *vs.* Horseshoe Mining and Milling Co., defendants and respondents. Filed in open court this 2d day of October, 1901. Frank Crane, clerk. Remittitur.

39 "H"—*a*—1342.

In the Supreme Court, State of South Dakota.

WILLIAM S. ELDER, as Administrator, etc., ET AL., Appellants,
vs.
HORSESHOE MINING AND MILLING COMPANY ET AL., Respondents.

Opinion. Filed —— —, 1901.

Appeal from circuit court, Lawrence county.

40 Martin & Mason, Frank McLaughlin, for appellants.
Edwin Van Cise, for respondent.

HANEY, *J.:*

In this action the plaintiffs seek to establish title to an undivided one-half interest in certain mining ground heretofore patented as the North lode and to compel the defendant, The Horseshoe Mining and Milling Co., to convey such interest. Defendant appealed from a judgment in favor of the plaintiffs, which was reversed by this court. 9 S. D. 636. The action having been again tried by the court, without a jury, judgment was rendered in favor of the defendants and the plaintiffs appealed.

An extended statement of the facts will be found in our former decision wherein it was held that notices of forfeiture addressed "to Rufus Wilsey, his heirs, administrators and to all whom it may concern" were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual, for the reason that they were not published during the entire period prescribed by the Federal statute. The notices were published every day except Sunday from Monday January 7, 1889 to Tuesday April 2, 1889, both inclusive. The statute reads as follows: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of

his co-owners who have made the required expenditures." U. S. Revsd. St. § 2324. Our attention has not been called to any
41 case wherein the language of this statute has been construed with reference to the question here presented nor have any cases been found wherein the same language has been so construed. It is evident that the notice by publication shall continue during ninety days. The phrase "for at least once a week for ninety days" should be rendered "at least once a week during ninety days." That is to say there shall be at least one publication in each week during the prescribed period. In other words notice shall continue ninety days and one publication each week constitutes the notice required. Necessarily the ninety-days period begins with the first publication. In the case at bar it began on Monday January 7th. The publication on that day was sufficient for the week beginning on that day. Publication on the following and each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7, to April 1, both inclusive. If no publication was required after the first until the following Monday none was required after April 1, until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication ninety days ended on Saturday April 6th. Excluding the first day ninety days ended on Sunday April 7th. On that day the required notice had continued during ninety days and another publication on Monday April 8, was wholly unnecessary. Conceding that the statute should be strictly construed, we think, there was a complete compliance with its provisions respecting the duration of the publication. The judgment of the circuit court is affirmed.

[Endorsed:] Elder *vs.* Horseshoe Co. 87 N. W. 586.

42 "C"—*r.*

In the Supreme Court, State of South Dakota.

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, and Elizabeth Wilsey, *et al.*, Heirs at Law of Rufus Wilsey, Respondents,
vs.
HORSESHOE MINING AND MILLING COMPANY ET AL., Appellants. } 696.

Appeal from circuit court, Lawrence county.

Opinion. Filed May 6, 1897.

43 Edwin Van Cise, for appellants.
Martin & Mason, Frank McLaughlin, for respondents.

CORSON, *P. J.:*

In January 1878 Charles H. Havens and Rufus Wilsey located a mining claim in the Black Hills, under the name of the "Golden

Sand" lode. In June, 1878 Wilsey died leaving a widow and several children, who then and have ever since, resided in the State of Iowa.

After the death of Wilsey, Havens continued to make the required annual expenditure upon the claim until 1892, when he sold the same to Thos. H. White, the managing agent of the defendant. At the time of his sale, Havens assumed to be the owner of the whole claim by virtue of proceedings taken under the provisions of section 2324 U. S. Rev. Stat. by which he sought to transfer the interest of Wilsey to himself.

The validity of these proceedings constitute the principal question in this case. To fully comprehend the various questions arising out of these proceedings, it may be proper to state that soon after the death of Wilsey one John Stephens was appointed administrator of his estate by the probate court of Lawrence county.

This administrator died in 1888 and there was no administrator of the estate of Wilsey after that time, until 1893, when the plaintiff Elder was appointed.

After Thos. H. White purchased the Golden Sand claim from Havens, he through Joseph M. Thomas, a nephew, caused the said Golden Sand claim to be relocated under the name of the "North" lode and an application for a U. S. patent to be made therefor, which was issued to said Thomas, who in November 1893 conveyed the patented claims to the defendant and appellant.

The undisputed evidence shows that the expenses for work
44 done upon the North claim after its location and the expense of obtaining a patent therefor was paid by the defendant,—The Horseshoe Mining Company.

In the summer of 1893, after the plaintiff Elder was appointed administrator of the estate of Wilsey, he together with the heirs of the estate tendered to said White, Thomas and the defendant one half of the amount of the annual expenditure required to be made upon the Golden Sand claim from 1878 to 1893 and demanded a deed for one half of the claim as patented by said Thomas, as the "North" lode. The parties refusing to make such conveyance, this action was instituted in the name of the administrator and heirs to recover one half of the property. The case was tried by the court without a jury and it found in favor of the plaintiffs and the defendant has appealed.

It will be noticed that from 1888 to 1893 there was no administrator of the estate of Wilsey. The record discloses no transfer of the Golden Sand location by Thos. H. White to the defendant and its title rests entirely upon the "North" Lode location.

It will be observed that the "Golden Sand" lode was located in 1878 by Havens and Wilsey; that Wilsey died during the same year; that Havens did all the annual work required upon the claim from 1878 to 1892 and that in the latter year he transferred the whole claim to the agent of defendant. The "Golden Sand" lode was then relocated by the agent of the defendant as the "North" lode, a patent issued therefor and that the same was conveyed to

the defendant, The Horseshoe Mining Co. It is claimed by the plaintiffs that the relocation was a fraud upon them. But in the view we take of the case, the only material question to be considered is as to the validity of the Havens' proceedings in his
45 attempt to acquire the half interest of Wilsey to the "Golden Sand" lode, for if he acquired a valid title to the Wilsey interest, then it was immaterial as to what disposition the defendant made of the claim subsequent to the transfer of the same by Havens, as it is not disputed that Havens' conveyance was in form a conveyance of the whole claim.

For the purposes of this case we shall assume as found by the court that the Golden Sand lode was properly located and was a good and valid location at the time of the death of Wilsey and that the annual assessment work was duly performed upon said claim, up to the time it was transferred by Havens to White in 1892. If, therefore, the proceedings taken by Havens divested the estate of Wilsey of its title, then the defendant obtained a good title to the whole claim under the North Lode location.

In order to establish the fact that Harvens had complied with the provisions of the U. S. statute and had thereby acquired the Wilsey interest, defendant offered in evidence two published notices, published at the same time, and being substantially copies of each other, except that the first covered a period of eight years and the latter one year. The notice is as follows: "Notice of forfeiture. To Rufus Wilsey, his heir's, administrators and to all whom it may concern: You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode, * * * as will appear by certificate filed on Jan. 2nd, 1889, in the office of the register of deeds of said Lawrence county, in order to hold said premises under the provisions of the laws of the United States and of this Territory, that being $100 per year, the amount required to hold the claim for the years ending December 31st, 1880, December 31st, 1881, Dec. 31st, 1882, December 31st, 1883, Dec. 31st, 1884, December 31st, 1885, December 31st, 1886 and December 31st, 1887. And if within ninety days after this notice by
46 publication you fail or refuse to contribute your proportion (400, being $50 for each of said years), your interests in said claim will become the property of the subscriber under section 2324 Revised Statutes of the United States."

To the introduction of this notice, the counsel for the plaintiffs interposed the following objections among others: "5th, because the notice is itself a nul-ity, because it is shown in the record, that Rufus Wilsey was at the time deceased, and a notice cannot run of forfeiture against a dead man, or his estate; neither is this notice addressed to the administrator of the estate in name, or by the proper designation; nor are the heirs enumerated in the notice; and a notice to the persons by description, is in all cases invalid. The further objection is made to this notice of forfeiture, that no sufficient pleadings upon the subject is set out in the answer. Further objection is made to this one now offered, that the notice is further

invalid because it undertakes to group the notice of the forfeiture for several years in one notice; also the further objection that no sufficient foundation for the publication of the notice instead of the personal service of it has been laid; and further that it is not shown that if the publication were proper, the Lead Herald, the paper referred to was the paper required by the statute in which it could be published."

The court sustained the objection stating that: "The objection will be sustained on the ground that the evidence in this case shows that Rufus Wilsey was dead, and that there was no legal administrator; his administrator was also deceased at the time this notice of forfeiture was published, and that therefore his co-owner gained nothing by it."

47 The second notice offered was for the year ending December 31st 1888 and the amount specified was $50. The same objection was taken and the same ruling made by the court.

Congress in 1872 enacted the present mining law and therein provided that all valuable mineral deposits should be "free and open to exploration and purchase and the lands in which they are found to occupation and purchase." The act prescribes the size of claims, manner of locating same, and that not less than $100 "worth of labor shall be performed or improvements made during each year." The act also provides that "the locators * * * their heirs and assigns * * * so long as they comply with the laws of the United States and with State, territorial and local regulations * * * shall have the exclusive right of possession and enjoyment" of the claim located.

Section 2324 after prescribing the value of the work to be done or improvements made during each year, further provides that "upon a failure to comply with the foregoing conditions of annual expenditure, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: Provided, that the original locators, their heirs assigns, or legal representatives have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required thereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days and if at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute his proportion of

48 the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

It will thus be seen that the estate of the locator or owner of a mining claim, before a patent is issued, is a conditional estate subject to be defeated by a failure to perform the required annual work upon the claim and that any qualified person may take advantage

of the failure to perform the condition and relocate the same. It follows, therefore, that the locator, his heirs and assigns must see that the condition is performed in order that their right to the possession may continue.

When the location is made by two or more, they become co-owners and one or more of the co-owners may do the required work upon the claim and thus perform the condition and thereby continue the right of themselves and co-owners to the exclusive possession of the claim. But no duty is imposed upon any one co-owner to do this. If the work is done, however, by one or more, the law requires the other co-owner or owners to contribute his or their share of the required expense and upon failure so to do, his or their interest becomes the property of those performing the work upon compliance with the requirements of the statute, which is the giving "such delinquent co-owner personal notice in writing or notice by publication in the newspaper published the nearest to the claim."

The statute makes no specific provision for any address or heading to the notice.

As will have been observed the notice in the case at bar is addressed "to Rufus Wilsey, his heirs, administrators and to all whom it may concern."

Wilsey having died in 1878, the notice as to him was nugatory.
49 It was also addressed to the administrators. There being none then living, it could have no effect in that respect. But it is also addressed to the "heirs, and to all whom it may concern."

At the time this notice was published the title to a one half interest in the claim was in the heirs, subject to the lien of the administrator for administration purposes and had been since the death of Wilsey. Section- 3400, 5772, 5860, 5862, Comp. Laws. In the Matter of the Estate of Woodworth, 31 Cal. 595; Weeks *v.* Hahn, 20 Cal. 627; Brenhan *v.* Story, 39 Cal. 179; Janes *v.* Throckmorton, 57 Cal. 368; Beckett *v.* Selver, 7 Cal. 238.

It is said in the latter case "that both the real and personal estate of the intestate vests in the heir subject to the lien of the administrator for the payment of debts and the expenses of administration and with the right of the administrator to present possession" and this says Mr. Justice Field in Weeks *v.* Hahn, *supra*, "is the true rule."

The provisions of our own statute upon the subject of succession and the provisions of our probate code bearing upon this subject are substantially, if not identically the same as the corresponding sections in the California code.

If this view of the laws is correct the heirs of Wilsey were in fact co-owners with Havens in the Golden Sand claim, from 1878 to the time of the publication of the notice; and the notice directed to them as heirs would seem to be sufficient to charge them with notice and require them to pay the estate's proportion of the expenses. If such was the position of the heirs the existence or non existence of an administrator could not affect them.

50 Having succeeded to the Wilsey interest, they took it burdened with the condition, that there share of the annual expenditure must be provided for. It was their duty, therefore, to see that the work was done.

The heirs are presumed to know the law and to know that this work was required to be done anually. The fact therefore that there was no administrator when the notice was published seems not to be very material.

But in the view we take of the provisions of the United States statute, from which we have quoted, the question of the rights of heirs and of administrators over the real property of a deceased becomes unimportant.

We are clearly of the opinion that Congress by the provision we are considering intended that the notice published should have the effect of notice to all parties who might have any interest under the co-owner who is in default and cut off all such interests whether the parties claiming are minors, heirs or lien holders, when, as in this case, the notice is so addressed as to include all parties. It is apparent that Congress by the notice intended to give to one or more co-owners who may cause the required work to be done upon the claim, a summary remedy for collecting from a co-owner his proportionate share of the expense, so necessarily incurred to protect the claim, either in money or by taking the co-owner's interest in the claim. The evident purpose and object of the law of 1872 was to encourage the exploration and development of the mineral lands of the United States and the sale of the same and all the provisions of the law seem to have been framed with that object in view. This is apparent from that part of the act providing that unless the annual expenditure shall be made each year the claim shall be subject to relocation and no rights of heirs, minors, widows or lien holders are excepted or reserved and no proceeding
51 judicial or otherwise, is required to divest the delinquent locator or locators of his or their interest or the interest of heirs or lien holders in the claim. If the required work is not performed and the claim is relocated after the expiration of the year the rights of all the parties are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year.

Again, when an application for patent is made the land officers are required to publish a notice,—not addressed to any one,—that such application has been made. If no adverse claim is filed within sixty days after the first publication of such notice, the rights of all parties holding adverse claims are cut off without regard to whether the parties claiming them, are minors, heirs, lien holders or otherwise. These illustrations sufficiently disclose the intention of Congress in the passage of the act of 1872.

We feel justified in the conclusion that Congress in adopting the provisions in regard to the disposition to be made of a defaulting co-owner's interest in the claim acted upon the same theory, and the published notice was intended to accomplish the same result as

the published notice of application for a patent, that is, to cut off the claims of all persons and vest in the co-owner a clear title to his co-owner's interest, without regard to the interest of minors, lien holders or incumbrancers. This, as I understand is the view taken by the United States Land Department of this provision.

That department requires abstracts of title, and when it appears by the record that the proper affidavits have been filed and the proper notice published, no further evidence is required. But if the construction contended for by the learned counsel for the respondent is correct, then the department should require proof that
52 the co-owner was living at the time the notice was published or if dead, that there was an administrator appointed and then performing the duties of his office, and that the heirs were not minors, and possibly a number of other facts in order that the applicant's title should be regarded as sufficient to entitle him to his patent. With such a construction as is contended for, the provision would be absolutely worthless and instead of conferring a benefit upon the co-owner, would be a delusion and a snare. No person could safely invest in a claim in the chain of title to which there was such a notice, however regular it might appear to be by the record.

It will be further observed on reading the provision that the conditions under which the notice may be served personally, is not prescribed, thus leaving it optional to the party when and under what circumstances he will serve the notice personally,—clearly indicating that in the opinion of Congress, the notice would ordinarily be published, and as we reason, in order that the lien of all parties might be cut off and that the true owner be vested with a clear title.

This construction of the law renders the notice, when rightfully published, effective in cutting off the claims of all parties and thus keeping the title clear and free from uncertainty and doubt. It gives to the notice the effect usually designed to be given to that class of notices when the claims of all persons are intended to be cut off as in the case of mortgages containing a power of sale; Reilly *v.* Phillips, 4 S. D. 604; probate court proceedings applications for patents, &c. The court was in error in excluding the notice and for this error the judgment of the court below must be reversed.

The other objections made to the admission of the published notice, it seems to us, do not merit very much consideration.
53 The objection that the heirs are not individually named in the notice cannot be sustained. To require of a co-owner to ascertain at his peril the names of all the heirs of delinquent co-owners, would be to impose upon him a burden the law never intended should be imposed and one that could be of no possible benefit to any one, as the heirs if personally named, would be no more likely to obtain actual notice than when named simply as heirs.

Neither do we think there is any merit in the objection that in the one notice the expenditure for eight years is included. Certainly if the parties interested intended to pay and thus protect their interest in the claim, they would be greatly benefited by grouping them all

in one notice. If they did not intend to pay, the grouping would be immaterial to them. The law does not prohibit it and we can discover no valid reason why it may not be done.

The objection that the notice was fatally defective because addressed to Rufus Wilsey and administrators, as well as heirs and to all whom it might concern is not tenable. It was one method of designating by whom the claim was located. Perhaps the notice addressed to the *heris* of Rufus Wilsey, deceased, would have been more technically correct but we think the form is not material so long as the statute is substantially complied with.

The insertion of the administrator could do no harm even if there was none.

There are numerous other errors assigned in the record but we do not deem it necessary to discuss them at this time.

The judgment of the circuit court and the order denying a new trial are reversed.

53½–56 [Endorsed:] Elder, adm'r, *vs.* Horseshoe M. & M. Co. Copy Sup. ct. Opinion. 9 S. D. 636 (70 N. W. 1060)

* * * * * * *

57 UNITED STATES OF AMERICA, *ss:*

To the Horseshoe Mining & Milling Company, Joseph M. Thomas, and Wilmot G. White, as administrator of the estate of Thomas H. White, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of South Dakota wherein William S. Elder, as administrator of the estate of Rufus Wilsey, deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey, and Frank Wilsey, heirs at law of the estate of Rufus Wilsey, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand nine hundred and three.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

58 [Endorsed:] Original. Citation.

STATE OF SOUTH DAKOTA, } ss:
County of Lawrence, }

I, Fred Doten, sheriff of Lawrence county, South Dakota, do horeby certify and return that the within citation came int- my hands for service on the 28th day January, 1903, and that I served the same on the Horseshoe Mining Company by delivering to and leaving a true and correct copy thereof with Anson Higby, general supt. of the above named company at Deadwood in Lawrence county, South Dakota on the 28th day of January 1903, and that I also served the citation on Wilmot G. White Thomas by delivering to and leaving a true and correct — thereof with her at Deadwood in Lawrence county, South Dakota on the 2nd day of February 1903.

FRED DOTEN, *Sheriff,*
By HARRY TRATHEN, *Deputy.*

Fees.

Citation	1.10
Cop	50
M'l'g	20
	$1.80

58½ *Affidavit of Service.*

Office of Martin & Mason.

STATE OF SOUTH DAKOTA, } ss:
County of Lawrence, }

Harry Trathen, deputy sheriff of the city of Deadwood, Lawrence county, South Dakota, being duly sworn, says he is over 21 years of age; that at the city of Deadwood, Lawrence county, South Dakota, on the 28th day of January A. D. 189–, he served the annexed citation on the Horseshoe Mining Company by delivering to and leaving a true and correct copy thereof with Anson Higby, general superintendent of said company, and on Wilmot G. White now Wilmot G. White Thomas in this action, by delivering to and leaving with her a true copy thereof. Service on both of the above named parties was made at Deadwood, in Lawrence county, South Dakota, on January 28th and February 2nd, 1903, respectively.

He further says that he knew the person- served as aforesaid to be the persons above named.

HARRY TRATHEN.

Sworn and subscribed to before me this 6th day of February, A. D. 1903.

[Seal of T. J. Laffey, Notary Public, South Dakota.]

T. J. LAFFEY,
Notary Public.

[Endorsed :] Citation.

59 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William S. Elder, as administrator of the estate of Rufus Wilsey, deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey and Frank Wilsey, heirs at law of the estate of Rufus Wilsey, deceased, plaintiffs, and The Horseshoe Mining & Milling Company, Joseph M. Thomas, and Wilmot G. White, as administrator of the estate of Thomas H. White, deceased, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-

60 tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Due and personal service by copy of the within writ of error is hereby admitted at Denver, Colorado, this — day of —, A. D. 1903. —— ——, attorney for ——.

61 In the Supreme Court of the United States.

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey, and Frank Wilsey, Heirs-at-law of the Estate of Rufus Wilsey, Deceased, Plaintiffs,

vs.

HORSESHOE MINING & MILLING COMPANY, Joseph M. Thomas, and Wilmot G. White, as Administratrix of the Estate of Thomas H. White, Deceased, Defendants.

} Bond on Writ of Error.

Know all men by these presents, that we, William S. Elder as administrator of the estate of Rufus Wilsey, deceased, and Elizabeth Wilsey, George Warren Wilsey, Charles Lincoln Wilsey, Edward Wilsey and Frank Wilsey, heirs at law of the estate of Rufus Wilsey, deceased, as principals, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto The Horseshoe Mining & Milling Company, Joseph M. Thomas and Wilmot G. White as administratrix of the estate of Thomas H. White, defendants in error above named, in the sum of five hundred ($500.00) dollars to be paid to the said defendants in error, their successors, executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 11th day of November, 1902.

Whereas, lately at a session of the supreme court of the State of South Dakota, in a suit pending in said court between the above named plaintiffs and the above named defendants, a final judgment was entered against the said plaintiffs, and the said plaintiffs having applied for and obtained from said court, a writ of error to
62 reverse the judgment in the aforesaid suit and a citation directed to said defendants in error is about to be issued, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, D. C.

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute their writ of error to effect and shall answer all damages and costs that may be awarded against

them, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Witness their hands this 11th day of November, 1902.

WM. S. ELDER,
As Administrator, &c.,
ELIZABETH WILSEY,
GEO. WARREN WILSEY,
CHARLES LINCOLN WILSEY,
EDWARD WILSEY,
FRANK WILSEY,
Heirs-at-law, &c.,
By MARTIN & MASON,
Their Attorneys.
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By JAMES P. HYMER, *Gen'l Ag't, and*
N. T. MASON, *Att'y.*

{Seal of the United States Fidelity & Guaranty Company, Incorporated 1896.}

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the U. S.

Jan'y 21, 1903.

STATE OF SOUTH DAKOTA, } ss:
County of Lawrence, }

On this 11th day of November in the year 1902, before me, T. J. Laffey, a notary public within and for said county and State, personally appeared James P. Hymer and N. T. Mason, known to me to be the general agent and attorney, respectively, of the corporation that is described in and that executed the within instrument, and acknowledged to me that such corporation executed the same.

Approved,

[Seal of T. J. Laffey, Notary Public, South Dakota.]

T. J. LAFFEY,
Notary Public.

63 [Endorsed:] Original. In the Supreme Court of the United States. William S. Elder as adm'r etc., *et al.*, plaintiffs *vs.* Horseshoe Mining & Milling Company, *et al.*, defendants. Bond on writ of error. Martin & Mason, att'ys for plaintiffs, Deadwood, S. D.

64 In the Supreme Court of the United States.

WILLIAM S. ELDER, as Administrator, etc., ET AL., Plaintiffs in Error,
vs.
HORSESHOE MINING & MILLING COMPANY ET AL., Defendants in Error.

Statement of Parts of Record, etc.

The following is a statement of the errors on which plaintiffs in error intend to rely and of the parts of the record which they think necessary for the consideration thereof.

I.

Statement of Errors.

The South Dakota supreme court erred in holding:

1. That the published notice of forfeiture under Revised Statutes of the United States, section 2324, addressed to "Rufus Wilsey, his heirs, administrators and to all whom it may concern" was sufficient to divest the title of plaintiffs in error, though said Wilsey was dead during the time of publication and there was no administrator of his estate.

2. That a published notice of forfeiture under Revised Statutes of the United States, section 2324, is sufficient to divest the title of plaintiffs in error, though alleged delinquencies in the performance of representation work for several years were grouped in one notice.

3. That a notice of forfeiture under Revised Statutes of the United States, 2324, is sufficient to divest title of plaintiffs in error, though the same was published in a daily newspaper and ninety (90) days had not expired between the first and last publication thereof, to-wit: between January 7th, 1889, the first publication, and April 2nd, 1889, the last publication thereof.

4. In affirming the second conclusion of law in the decision
65 of the lower or circuit court of the State of South Dakota.

5. In affirming the judgment rendered in the lower or circuit court of the State of South Dakota and in rendering judgment in favor of the defendants in error and against the plaintiffs in error, wherein by the law of the land, the said judgment ought to have been given for the said plaintiffs in error and against the said defendants in error.

II.

Statement of Parts of Record, etc.

1. Complaint.
2. Answer.
3. Findings of fact.
4. First and second conclusions of law.
5. Judgment.
6. Two opinions of State supreme court.

EBEN W. MARTIN,
NORMAN T. MASON,
Att'ys for Pl'ffs in Error.

66 [Endorsed:] In the Supreme Court of the United States. William S. Elder as adm'r etc. *et al.*, pl'ffs in error. *vs.* Horseshoe Mining & Milling Co., *et al.*, def't in error. Statement of parts of record, etc., Due and personal service by copy of the within statement is hereby admitted at Deadwood, South Dakota, this 19 day of May A. D. 1903 Moody, Kellar & Moody. Chambers Kellar, G. C. Moody. J. C. Moody, attorney for ——. Eben W. Martin, Norman T. Mason, att'ys for pl'ffs in error.

67 [Endorsed:] File No. 18,838. Supreme Court U. S. October term, 1902 Term No. 610. W. S. Elder *et al.* P. E. *vs.* The Horseshoe Mining & Milling Co *et al.* Assignment of errors & designation by pl'ffs in error of parts of record to be printed. Filed May 23d, 1903.

68 In the Supreme Court of the United States.

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, Deceased, and Elizabeth Wilsey *et al.*, Plaintiffs in Error, *vs.* THE HORSESHOE MINING & MILLING Company, Joseph M. Thomas, and Wilmot G. White, as Administrator of the Estate of Thomas H. White, Deceased, Defendants in Error.	No. 220. October Term, 1903.

To Eben W. Martin, Esq., and Norman T. Mason, Esq., attorneys and counselors for plaintiffs in error, and to Honorable James H. McKenney, clerk of said court:—

You are notified that the defendants in error designate the following additional parts of the record herein which they think material and request that the same be printed for the consideration of the

court herein, to wit: the third, (3rd,) fourth (4th), and fifth (5th) conclusions of law.

Dated August 14th 1903.

Very respectfully yours,

G. C. MOODY,
CHAMBERS KELLAR,
JAMES C. MOODY,
Attorneys for Defendants in Error.

69 [Endorsed:] In the Supreme Court of the United States. William S. Elder *et al.* plaintiffs in error, *vs.* Horseshoe Mining Company *et al.* defendants in error. No. 220, October term, 1903. Personal service of the within statement and notice admitted this 14th day of August, 1903. Martin & Mason, attorneys for plaintiffs in error.

70 [Endorsed:] File No. 18,838. Supreme Court U. S. October term, 1903. Term No. 220. Wm. S. Elder *et al.* P. E. *vs.* Horseshoe Mining Co. *et al.* Designation by def't in error of additional parts of record to be printed, & proof of notice of same. Filed Aug. 18, 1903.

Endorsed on cover: File No. 18,838. South Dakota supreme court. Term No. 220. William S. Elder, as administrator of the estate of Rufus Wilsey, deceased; Elizabeth Wilsey *et al.*, plaintiffs in error, *vs.* The Horseshoe Mining and Milling Company, Joseph M. Thomas, *et al.* Filed February 18, 1903.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 220.

WILLIAM S. ELDER, as Administrator, etc., *et al.*,

Plaintiffs in Error,

vs.

THE HORSESHOE MINING & MILLING CO., *et al.*,

In error to the Supreme Court of the State of South Dakota.

BRIEF OF PLAINTIFFS IN ERROR.

Martin Mason

Attorneys for Plaintiffs in Error.

20377

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 220.

WILLIAM S. ELDER. as Administrator, etc. *et al.*,

Plaintiffs in Error,

vs.

THE HORSESHOE MINING & MILLING CO., *et al.*,

In error to the Supreme Court of the State of South Dakota.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

Plaintiffs in error brought this action in the State Court alleging that their intestate and ancestor, Rufus Wilsey, together with one C. H. Havens on Jan. 21, 1878, entered upon the unappropriated mineral lands of the United States and "duly located and appropriated under the mining laws of the United States and of the Territory of Dakota, the Golden Sand lode or mining claim." That "said locators, Wilsey and Havens, during the lifetime of said Wilsey, performed all work and labor required under the laws of the United States and of the Territory of Dakota for the development and holding of said property

and the protection and perfection of title thereto" and that "all things required under the laws of the United States and of the territory of Dakota and the state of South Dakota to perfect and protect title to said property have been done and performed from time to time as required by law"; (Trans. p. 1, fol. 2) and that the plaintiffs are now the owners and entitled to the possession of an undivided one-half interest in said property; that the defendant, Company claims to be the owner of such half interest by reason of a certain conveyance to it from the original locator, C. H. Havens, and by reason of certain patent proceedings prosecuted by the Company whereby it obtained United States patent to the premises under the name of the "North" lode; plaintiffs pray that the defendant Company be decreed to hold in trust for the plaintiffs an undivided one-half interest in the land embraced in the "North" location, and to convey the same to the plaintiffs. The defendant Company admitted the taking by it of a deed from C. H. Havens, purporting to convey the entire "Golden Sand" claim, and alleging that Havens had theretofore acquired the half interest formerly belonging to Rufus Wilsey by reason of certain forfeiture proceedings taken by Havens against Wilsey for the latter's alleged failure to perform his share of the annual representation work upon the claim during the years 1880 to 1888, inclusive. (Trans. p. 6.)

This controversy depends upon the validity of these forfeiture proceedings. The supreme court of the state upheld their validity, and, consequently, awarded the half interest in controversy to the defendant Company.

These proceedings, as found by the state court, were as follows: Rufus Wilsey died insolvent in June, 1878, leaving a number of unpaid creditors; (Trans. p.11) on January 7, 1889, his co-locator, C. H. Havens, commenced the publication in the "Belt Herald" (a daily newspaper published in Lead City, South Dakota, and the newspaper published nearest the "Golden Sand" claim) of a notice of forfeiture, which notice was as follows:

"NOTICE OF FORFEITURE.

"To Rufus Wilsey, his heirs, administrators, and to all whom it may concern: You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode, said lode being described as follows: On the divide between the Middle Deadwood Gulch and a branch of Spearfish Creek, about 2,000 feet east of the Portland lode or deposit, about five miles from Poorman Gulch, the discovery shaft about 40 feet from Bear Gulch trail, supposed to be in Whitewood Quartz Mining District, in Lawrence County, D. T., as will appear by certificate filed on January 2, 1889, in the office of the Register of Deeds of said Lawrence County in order to hold said premises under the provisions of the laws of the United States and of this Territory, that being $100 per year, the amount required to hold the claim for the years ending December 31, 1880, December 31, 1881, December 31, 1882, December 31, 1883, December 31, 1884, December 31, 1885, December 31, 1886, and December 31, 1887. And if within ninety days after this notice by publication you fail or refuse to contribute your proportion ($400, being $50 for each of said years) your interest in said claim will become the property of the subscriber under Section 2324, Revised Statutes of the United States.

C. H. HAVENS."

This notice was published in each daily issue of the paper every day of the week, except Sunday, beginning Monday, January 7, 1889,and concluding Tuesday, April 2, 1889. (Trans. p. 14, fol. 23.)

During the period of its publication there was no administrator of the Wilsey estate, and his heirs (co-plaintiffs in error herein) were non-residents of Dakota.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of South Dakota erred:

(1) In holding that the published notice of forfeiture under Revised Statutes of the United States, Section

2324, addressed to "Rufus Wilsey, his heirs, administrators and to all whom it may concern" was sufficient to divest the title of plaintiffs in error, though said Wilsey was dead during the time of publication and there was no administrator of his estate.

(2) In holding that a notice of forfeiture under Revised Statutes of the United States, Sec. 2324, is sufficient to divest title of plaintiffs in error, though the same was published in a daily newspaper, and ninety (90) days had not expired between the first and last publication thereof, to-wit: Between January 7th, 1889, the first publication, and April 2nd, 1889, the last publication thereof.

(3) In affirming the second conclusion of law in the decision of the lower or circuit court of the State of South Dakota.

(4) In affirming the judgment rendered in the lower or circuit court of the State of South Dakota and in rendering judgment in favor of the defendants in error and against the plaintiffs in error.

I.

THE NOTICE OF FORFEITURE WAS INSUFFICIENTLY ADDRESSED.

Preliminarily, if there is any doubt as to the interpretation of the forfeiture provision of Section 2324, the statute should be construed strictly as against defendants because it is a statute of forfeiture.

"A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law."

Hammer vs. Garfield M. &. M. Co. 130 U. S 291.
S. C. 9 Sup. Ct. Rep. 549, 552.
Johnson vs. Young 24 Pac. Rep. 173 (Col.)
Quigley vs. Gillette 35 Pac. Rep. 1040 (Cal.)

"In an ex parte proceeding, as a sale of land for taxes,

under a special authority, great strictness is required. An individual cannot be devested of his property against his consent, until every substantial requisite of the law has been complied with."

Early vs. Doe, 16 How. (U. S.) 615-618.

Ronkendorff's Case, 4 Pet., 349.

Statutes providing for giving notice by publication are in derogation of common law and must be strictly construed.

16 Am. & Eng. Enc. Laws, page 817.

"Forfeitures are not favored in the law. Courts always incline against them."

Farmers, etc., Natl. Bank vs. Dearing, 91, U. S. 35.

Citing Marshall vs. Vicksburg, 15 Wall, 146.

This Court in construing this very statute under which defendants claim to have acquired Wilsey's title, (Rev. Stat. U. S., Sec. 2324), says: "Neither of these, however, made him a co-owner during the year 1884, within the meaning of the statute which, providing as it does for the forfeiture of the rights of a co-owner, should be strictly construed."

Turner vs. Sawyer, 150 U. S. 578; S. C. 14 Sup. Ct. Rep. 192.

The supreme court of Montana has recently held the same, treating the question entirely as one of forfeiture. After quoting the section of the statutes, the Court says: "This is a statute of forfeitures. That the forfeiture may be worked, the facts constituting it, or laying the foundation for it, must exist. The statute must be strictly construed," citing Turner vs. Sawyer, supra.

Brundy vs. Mayfield, 38 Pac. Rep. 1067, (Mont.)

(1.) The notice of forfeiture was addressed "To Rufus Wilsey, his heirs, administrator, and to all whom it may concern." Though nominally to both Wilsey and his heirs, etc., in reality it could only be notice to one or the other; not to both; since Wilsey could have no heirs or administrator until his death. *Nam nemo est haeres viventis* The notice must then be construed as given

either to Wilsey or to his heirs, administrator, etc. Under such circumstances, would it not be the reasonable, to say nothing of the strict, construction, to say that the notice is given to the one to whom it is definitely addressed by name, and not those indefinitely addressed by description only?

(2) But let it be assumed that the only definite part of this notice can be disregarded, or treated as surplusage, without doing violence to the rule of construction by which we must be governed. We are then confronted by the proposition, which we deem to be undoubted law, that the administrator of an insolvent estate is a necessary party to a complete determination of the title to real property belonging thereto. Otherwise creditors of the estate might be left without redress. Suppose the Wilsey heirs had by deed conveyed their interest in the Golden Sand to their co-tenant, Havens. Would the defendant contend that Havens would thereby acquire perfect title to the claim, divesting the administrator, and through him, the creditors of the estate, of the power of subjecting it to the payment of outstanding indebtedness? We hardly think so. Yet Havens could certainly acquire no greater rights by notice of forfeiture addressed solely to the heirs, than by deed signed solely by them. If Havens should bring an action against the heirs [illegible] to quiet his title, the decree could not possibly bind the administrator and prevent him from proceeding according to law to subject the property to the debts of the estate. Neither would this end be accomplished by notice of forfeiture. It is therefore plain that the administrator of an estate must be given notice, personally or by publication, before he, or creditors, can be bound. This was not done here, because even if a notice addressed to an administrator generally and not by name, is good, yet in this case there was no administrator, the former one having died in 1888.

In Billings vs. Aspen Co., a notice addressed to William J. Wood, or his administrator, was held to be nugatory, because Wood was dead, and the title which was

vested in his heirs could not be affected by a notice addressed to a dead man, or his administrator.

Billings. vs. Aspen Co., 51 Fed. Rep., 338.

(3) In the third place, not only the administrator but the heirs, of a deceased co-owner should be mentioned by name in a published notice of forfeiture. If the notice had been personally served on each party, it might with more reason be contended that it would not be so essential to insert the names of those intended to be affected. But if, in the absence of a statute expressly providing therefor, it is "due process of law" to divest one of property by a published notice directed to him generally as an "heir" it would seem to follow that a notice addressed simply "to whom it may concern" ought to be equally efficacious, and if that is sufficient, a published notice addressed to no one at all ought to be valid, because the presumption would be that it was only intended to affect those "whom it might concern." The result would be that every co-owner in a mining claim would be held to have notice, actual or constructive, of every notice of forfeiture published in his district, whether addressed to him, or to no one, and to be safe he would be compelled to actually read through all such notices in order to ascertain whether he was rightfully or wrongfully, sought to be affected thereby. Would this be a "strict construction" of the statute? On the contrary, could a more liberal construction be devised?

"One of the most important requisites of a service by publication is that it shall correctly state the parties to the suit, and that it shall correctly state the name of the defendant." Service upon the "Washington Trust Co., instead of the Washington Trust Co. of the City of New York," held invalid.

City of Detroit vs. Detroit City R. Co., 51 Fed. Rep., 9.

Notice to Grant B. Hunt instead of Garret B. Hunt, is insufficient.

Cotton vs. Rupert, 60 Mich. 318, S. C. 27. N. W., 520.

Judgment quieting title against Robert Brimford,

upon service by publication, is not good against Robert Binford.

Entreken vs. Chambers, 11 Kan., 368.

Service by publication addressed to "John McCorkle, —McCorkle, his wife" the husband being then dead, does not make his widow, Maria McCorkle, a party to the action.

Thompson vs. McCorkle, 34 N. E. Rep. 813, (Ind.)

"If, therefore, the heirs of L. Bleidorn had been named in the caption as defendants, and publication had been made for them by their proper names, such publication would have operated to make them parties as non-resident defendants;" but having been only described as "heirs of L. Bleidorn," the decree, as to them, was held a nullity.

Bleidorn vs. Pilot Mt. Co., 15 S. W. Rep. 737, (Tenn.)

Under a statute providing that "an order directed to the non-residents or absentees" shall be made, it was held: "This section of course means that the names of these non-residents or absentees shall be specified in the order. In no other conceivable way could the order be 'directed' to them."

Troyer vs. Wood, 10 S. W. Rep. 43, (Mo.)

"In the case of substituted service, or service by publication, no one is served who is not named, or what amounts to the same thing, who is incorrectly named; while in case of personal service, the right party is actually served by delivery of the writ, though he is not correctly named therein."

Chamberlain vs. Blogett, 10 S. W. Rep. 44, (Mo.)

A citation supporting judgment for taxes, addressed to the heirs of a certain person, held insufficient for not mentioning the names of such heirs.

New Orleans vs. St. Romes, 28 La. Ann. 17.

None of the cases relied upon by defendants in support of the theory that a general notice is good are in point. All such cases belong to one of two classes; either

the statute is held to expressly authorize such notice, or the court has already acquired jurisdiction of the thing, the proceeding being in the nature of one *in rem*.

(4) "If the facts in this case had been that the notices were wholly true, that the necessary facts were all present, that the notices were regular and formal in their matter and service, then an important and interesting question would have been presented to us; that is to say, whether, if the full requirements of the forfeiture notice of section 2324 are strictly complied with, there is a forfeiture worked and a transfer of title accomplished, *ipsis fatic*, or must the forfeiture be declared and adjudged by some appropriate action?"

Brundy vs. Mayfield, 38 Pac. Rep. 1069, (Mont.)

II.

THE NOTICE OF FORFEITURE WAS INSUFFICIENTLY PUBLISHED.

The notice of forfeiture in this case, was published in a daily paper, beginning Monday, Jan. 7, 1889, and concluding Tuesday, April 2, 1889, and no more. A period of but eighty-five days.

The statue requires the co-owner, who has performed the necessary annual representation work on a mining claim, to give his delinquent co-owner "Notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, etc."

Rev. Stats. U. S. Sec. 2324.

The question is:—Is a publication once each day, (Sundays excepted,) for eighty-five days, a publication "for at least once a week for ninety days?"

Had the statute read, "at least once a week in thirteen weeks," the publication would clearly have been sufficient.

Had it read, "at least once a week for thirteen weeks," there would have been some ground to contend for its sufficiency.

But reading as it does, "at least once a week for ninety days," it must mean something different from either of the foregoing phrases; otherwise one of those phrases would have been used by Congress.

To hold for defendants, it is absolutely essential to hold that "once a week for ninety days" means the same thing as "once a week in thirteen weeks," since the notice in question was only published twice, (on Monday and Tuesday,) in the thirteenth week; the last publication having been made five days before the expiration of ninety days from the first publication.

In other words, to hold for defendants, it is necessary to say that a publication once each day for eighty-five days, is the same thing as a publication, "once a week for ninety days."

To hold for defendants, it is necessary to hold that the phrase "for ninety days" is modified and changed in its meaning, by the phrase "once each week."

The statute requires that the notice should be published for "ninety days;" the fact that it must be published at least once each week does not make the duration of the entire publication any less.

Suppose the statute had simply required publication for ninety days. Could it be contended that a weekly monthly or daily publication covering but eighty-five days, between the first and last publications, would suffice?

A publication in each one of thirteen weeks is not a publication "for", or during, ninety days. If it is, then a publication in each one of three months, would be a publication for ninety days, though the first and last publications might not be more than sixty days apart.

If a publication in one week is equivalent to a publication for seven days, as defendants contend, then why is not a publication in one month equivalent to a publication for thirty days, or a publication in one year equivalent to a publication for 365 days?

The simple answer is, because the statute does not so provide: the statute does not provide that a publication "at least once a week," shall be equivalent to a publication for seven days, or that a publication eighty-six times in thirteen weeks, (as in the case at bar,) shall be the same thing as a publication "for ninety days."

The publication must be for ninety days; the fact that it need only be made once a week, does not lessen the number of days over which it must extend, nor enable the last publication to continue as a publication for five days after it has been completed.

Authorities.

A statute required that public notice of the time and place of sale should be given "by advertisement, once in each week, for at least twelve successive weeks." This Court held that the first notice must precede the sale eighty-four days. "The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words 'once a week," which precede in this statute those which follow them "for at least twelve successive weeks."

Early vs. Doe, 16 How. (U. S.) 617.

The United States Circuit Court of Appeals for this circuit, recently had before it a similar question. A statute provided that no sale should be had "without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale." The court said:—"In this act of Congress the preposition 'for' in the clause 'for at least four weeks,' as is often the case when it is used with relation to periods of time, clearly means 'during,' or 'during the continuance of.'" The Court therefore concluded that the publication of a notice of sale once a week for only 27 days before the day of sale is not a previous publication of such a notice 'once a week for at least four weeks prior to such sale."

Wilson vs. Northwestern Mut. Ins. Co., 12 C. C. A., 505; S. C. 65, Fed. Rep. 38.

The supreme court of North Dakota, in construing a statute requiring that notice be given "by publishing the same for six successive weeks, at least once in each week," said, "The word 'for' in this statute means 'throughout,' or 'during the continuance of'. It is obvious that a notice of sale has not been published during the continuance of a week, when the day of sale follows the day of publication at an interval of less than a week. * * If the statute had declared that the notice should be published once a week in each of six successive weeks, its meaning would have been different. But it does not so declare. Its explicit provision is that the notice shall be published for six successive weeks."

Finlayson vs. Peterson, 67 N. W. Rep. 954, (N. D.)

To the same effect are the following cases also:

Bacon vs. Kennedy, 56 Mich. 329 (22 N. W. Rep. 824.)

Pratt vs. Tinkcom, 21 Minn. 142-6.

Boyd vs. McFarlin, 58 Ga. 208.

Ogden vs. Walker, 59 Ind. 460-6.

Security Co. vs. Arbuckle, 24 N. E. Rep., 329, (Ind.)

Smith vs. Rowles, 85 Ind. 265.

Market Nat'l Bank vs. Bank, 89 N. Y. 398.

Application of Authorities.

In all the foregoing cases the object of the statute was to give notice of some definite event to occur at a fixed time subsequent to the notice; that is, of some definite event to occur in the future, such as a mortgage sale; and it was held that the entire specified time should elapse between the first publication and the future event, of which notice was required to be given.

The case at bar differs from the foregoing cases in that the statute now under consideration requires notice to be published during a specified time of an event that has already occurred; the notice is to be given of something which is in the past; which transpired prior to the notice; to-wit, the completed performance of the work by the advertising co-owner and the failure to contribute on the part of the delinquent, followed by a statement of the legal effect of continued delinquency.

In such a case there can be no room for respondents contention that the last publication continues as a publication for five days subsequent to its actual appearance; since it is not a definite event occurring thereafter, of which notice is given, but a condition or state of affars existing theretofore, and at the time of the notice. Notice of a past event or present condition cannot be given by publication "for ninety days," or during the continuance of ninety days, unless that period of time is actually covered by the publication; that is unless ninety days elapse between the first and last publication; whereas ninety days' notice of a future definite event might be given by one publication only, providing it were made ninety days prior to the event.

Furthermore the statutes in all the foregoing cases required a publication once in each week for a certain number of weeks; therefore a publication in one week might well be held to continue throughout that week, and last for the six days immediately following; but where a publication is requred once in each week for a given number of days, it cannot be held that the last publication extends or continues for any number of days after its completion. It is a publication for the day only on which it is made.

In the language of the North Dakota supreme court "if the statute had declared that the notice should be published once a week in each of six (thirteen) successive weeks, its meaning would have been different. But it does not so declare."

Finlayson vs. Peterson, 67 N. W. Rep. 954 (N. D.)

Defendants' whole contention resolves itself into the proposition that the phrase "at least once a week," modifies and changes the meaning of the phrase "for ninety days." This is clearly unfounded. The statute requires that the publication be "for ninety days;" this requirement is just as clear and explicit as though the phrase "at least once a week" had not been used. Now if the phrase "at least once a week" had not been used it would be self-evident that a publication for eighty-five days was not one

for ninety days. There would be no possibility for respondent's contention that the publication made on April 1st, lasted for a week after its actual appearance. As we have said, such a contention can only be based upon the implication, or assumption that the clause "at least once a week" in some way limits or lessens, or qualifies the requirement that the publication shall be "for ninety days." But this is impossible. The requirement that the notice shall appear at least once a week is wholly concerned with the frequency of the publication; it has nothing to do whatever with its duration, which remains unmodified and unchanged; it must still be "for ninety days," though it need only be once a week during that time.

The phrase in question specifies how often the notice must appear between the first and last publications; but it does not specify how long a time must elapse between those two dates; it is a requirement as to number of times and not as to length of time.

Defendant's Authorities.

None of defendants' authorities are in point, since none of them construe a statute requiring notice of a past event or present condition, once a week for a stated number of days.

Ronkendorff vs. Taylor's Lessee, 4 Pet. 349, required advertisement of time and place of a tax sale, once a week for three months. The court simply held that the publication need not be on the same day in each week; "if published once a week, for three months, the law is complied with, and its object effected."

In State of Nevada vs. Yellow Jacket Co., 5 Nev. 422, 436, the statute required notice of an election to be published "once a week for three weeks." The court held that the statute required but three publications of the notice, and that its full purpose was accomplished upon the expiration of the third day of publication, even though 21 days had not elapsed between the first publication and the day of election. The court expressly distinguished the case from one such as is here under consideration, by

saying: "Some statutes require a publication for a definite period of time, or a certain number of days, and in such case of course the advertisement must be for the full period." (p. 422.)

Justice Johnson dissented from the majority opinion, giving an elaborate review of authority in support of his dissent. (5 Nev. p. 425.)

In Wood vs. Knapp, 100 N. Y. 110, a notice of sale was required to be published "for the space of ten weeks." There were ten weekly publications, the first of which was sixteen weeks prior to date of sale. There was also a statute prescribing that the "time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen or which completes the full period of publication." The publication in question was held to fully comply with this rule.

Raum vs. Leech, 54 N. W. Rep. 1058 (Minn.) holds that under a statute requiring publication "once in each week for six consecutive weeks," it is not necessary that each publication be on the same day of the week.

Bachelor vs. Bachelor, 1 Mass. 256, required publication "three weeks successively."

In Steinle vs. Bell, 12 Abb. Pr. (N. S.) 176, the requirement was "once each week for six weeks."

In Knowlton vs. Knowlton, 39 N. E. Rep. 595, (Ill.) an attack was made upon the judgment of a Connecticut Court of general jurisdiction, on the ground that process was not published as required by order of the Connecticut Court "for two weeks successively before the term of the court to which the same was made returnable." The Illinois Court stated that "the order is probably susceptible of either of two constructions—the one demanding the lapse of two full weeks; the other only calling for publication once in each of two successive weeks; this latter was evidently the construction placed upon the order by the Connecticut Court;" and the Illinois Court adopted the Connecticut Court's construction.

In Martin vs. Hawkins, 35 S. W. Rep. 1104, (Ark.) the statute required notice of application for confirmation of a tax title to be "published six weeks in succession" six months before the beginning of the term at which the petition was to be heard. The notice was published by six successive weekly insertions, and the last publication was more than six months and seven days prior to the beginning of the term. It was held sufficient.

In Olcott vs. Robinson, 21 N. Y., 150, (in which there was a dissenting opinion,)notice of execution sale was required to be printed "once in each week, for six weeks successively."

The statute was the same in Wood vs. Morehouse, 45 N. Y. 368.

Both of these case are opposed to the decision of the U. S. Court of Appeals for this circuit and to the decision of the Supreme Court of North Dakota, supra.

In none of the foregoing cases and in none of those cited by defendants, so far as we are aware, was the decision based upon a statute requiring weekly publications for a certain period of days; and in all of them the notice required was of a future definite event.

They are not, therefore, of material assistance in the decision of this case.

If the matter were still left in doubt, the fact that it is a statute of forfeiture which is under consideration should decide the controversy in appellant's favor.

Decision of State Supreme Court.

The Supreme Court of the State in its decision on this point, (transcript p. 21.) makes no distinction in meaning between the phrases "at least once a week in thirteen weeks," and "once a week for ninety days."

Had Congress intended that a publication once a week for, or in, each one of thirteen weeks should be sufficient, it would certainly have used the obvious and common expression "at least once a week for (or in) thirteen weeks"; that it has not used this obvious ex-

pression; an expression which would immediately occur to anyone in attempting to formulate the idea embodied in the lower court's opinion, and the only expression which does really embody that idea,—Congress has, apparently, gone out of its way and used a wholly different phrase, to-wit:—"at least once a week for ninety days."

One of two things is, therefore, perfectly apparent,—either Congress has bungled in its use of language,—employing an inapt and uncommon phrase to express an idea which would naturally be formulated in a common and most obvious phrase,—or else by the employment of this peculiar language it meant some thing different from what would have been conveyed had the other expression been used. Of course, the courts are bound to take the second horn of this dilemma if it is possible; they are bound to presume that "at least once a week for ninety days" means something different from "at least once a week for thirteen weeks," if that presumption is consistent with any reasonable interpretation. They are bound to presume that different language conveys a different meaning; that different phrases mean different things; that Congress had a different intent when it said "at least once a week for ninety days" than it would have had if it had said "at least once a week for thirteen weeks." This presumption the state court clearly failed to indulge.

2. The state court has further fallen into the error of assuming that the phrase "at least once a week" qualifies, or in some way modifies the phrase "for ninety days." This is made perfectly clear by the following considerations: Suppose the statute had been worded that the notice should be "published for ninety days," omitting therefrom the phrase "at least once a week." Would any man contend that if the statute read in this way, a publication once a week in each of thirteen weeks,—but covering a period between the first and last publications of only eighty-five days, would comply with the statute? The

only basis for such an interpretation must, therefore, be the phrase "at least once a week" which is thereby given a qualifying and modifying effect upon the phrase "for ninety days." Indeed, it is apparent from the opinion itself of the State Court that its decision is controlled by and wholly based upon the phrase "at least once a week." The Court in its opinion says: "The publication on Monday, January 7th, was sufficient for the week beginning on that day." In other words, the Court assumes that one publication is notice for seven days. In this, we think, the Court is in error: first,--because of the reason of the thing; and, second--because of authority. Upon reason the phrase "at least once a week" simply specifies how often the notice must appear between the first and last publication. It has nothing whatever to do as to how long a time must elapse between those two dates;--it is solely a requirement as to the number of times of publication, and no requirement whatever as to the length of time thereof. The Court in its opinion, however, assumes that because the notice is required to be published at least "once a week" (a requirement as to number of times only) it, therefore, follows that a publication once in a week is a publication for seven days. It seems to us that this is necessarily a *non sequitur*,--that a requirement as to how often the notice must be published during a given length of time, cannot possibly be construed as having anything to do with the length of publication. A publication for one day certainly is not alone and of itself a publication for seven days. A publication once in a week certainly is not alone and of itself a publication for one week. Neither is a publication once each week for thirteen weeks (eighty-five days only expiring between the first and last publication) a publication for ninety days. Second: Upon the authority of this Honorable Court (a case which was not noticed by the State Court in its opinion) we think its decision is likewise erroneous. In

Early vs. Doe, 16 How. (U. S.) 617.

a statute required that public notice of the time

and place of sale should be given by advertisement once in each week for at least twelve successive weeks. The Supreme Court held that the first notice must precede the sale eighty-four days. "The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words 'once a week' which precede in this statute those which follow them, 'for at least twelve successive weeks.'"

For the foregoing reasons we submit that the decision of the Supreme Court of the State of South Dakota is erroneous and should be reversed.

EBEN W. MARTIN,
NORMAN T. MASON,
Attorneys for Plaintiffs in Error.

Deadwood, S. D., November, 1903.

In Error to the Supreme Court of the State of South Dakota

REPLY BRIEF OF PLAINTIFFS IN ERROR

Martin & Mason,
Attorneys for Plaintiffs in Error

20388

Supreme Court of the United States

OCTOBER TERM, 1903

No. 220

WILLIAM S. ELDER, as Administrator of the Estate of Rufus Wilsey, deceased; Elizabeth Wilsey, *et al.*,
- - - *Plaintiffs in Error*

vs.

THE HORSESHOE MINING & MILLING COMPANY, JOSEPH M. THOMAS, *et al.*,
- - - *Defendants in Error*

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In Error to the Supreme Court of the State of South Dakota

REPLY BRIEF OF PLAINTIFFS IN ERROR

I

THIS COURT'S JURISDICTION.

Defendants in error urge the dismissal of the writ of error for two reasons: (A) Because the judgment of the trial court was based upon three sufficient grounds two of which presented no Federal question; and though the opinions of the court of last resort show that its decree affirming the lower court's judgment was based solely upon the ground presenting a Federal question,

yet those opinions are not part of the record and must be disregarded in ascertaining what was actually decided by *the state supreme court*; and (B) Because, as they assert, it was the defendant and not the plaintiffs in error who set up a title under the United States statutes and the decision of the state court was in favor of the title so set up, and not adverse to any title claimed by plaintiffs in error.

A

It is not the judgment of the trial, but the highest court of the state, to-wit, the Supreme Court, that is subject to review in this Court. What, then, was the judgment of the Supreme Court?

If the opinions of the supreme court of the state can be examined in order to determine that question, it is perfectly apparent that the decision of that court was based entirely upon the Federal question as to the validity of forfeiture proceedings. In its first opinion reported in 9 S. D., 636.) the supreme court of the state says: "It is claimed by the plaintiffs that the re-location was a fraud upon them; but in the view we take of the case, the only material question to be considered is as to the validity of Havens' proceedings in his attempt to acquire the half interest of Wilsey to the "Golden Sand" lode. * * * * * If, therefore, the proceedings taken by Havens divested the estate of Wilsey of its title then the defendants obtained a good title to the whole claim under the 'North' lode location." (Trans. p. 24, fol. 45.)

In its decision on the second appeal (reported in 15 S. D., 124.) the supreme court of the state says: "An extended statement of the facts will be found in our form-

er decision, wherein it was held that notices of forfeiture addressed to Rufus Wilsey, his heirs, administrators and to all whom it may concern were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual for the reason that they were not published during the entire period prescribed by the Federal statutes." (Trans. p. 21, fol. 40). The court then discussed the question of publication, found against the contention of plaintiffs in error, and affirmed the judgment of the lower court.

It is therefore, clear that the judgment of the court of last resort was, in reality, based solely upon the decision of a Federal question.

The only question that remains then is, can the opinions of the state court, which are made a part of the transcript, be examined in order to ascertain that its decision was based solely on a Federal question? This question should be regarded as settled.

The question was first raised since the act of 1867 in the case of Murdock vs. City of Memphis, 20 Wall, 633.

Later, in a case arising in Illinois, where the state statute required that the justices of the supreme court should deliver and file written opinions in cases submitted to it, and that such opinions shall also be spread at large upon the recods of the court, this Court, after quoting from Murdock vs. City of Memphis, above cited, says: "We cannot, therefore, doubt that in the existing state of the law, it is our duty to examine the opinion of the supreme court of Illinois in connection with other portions of the record for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right title or im-

munity under the constitution or laws of the United States."

Gross v. United States Mortgage Co. 108 U. S. 485; 2 Supt. Ct. Rep. 945.

Again, in a case from Iowa, where the state law simply required the filing of the supreme court's opinions before judgment is rendered, this Court held: "But if we look to the opinions, which under the laws of Iowa must be filed before a judgment is rendered, and which, when such is the law, may certainly be looked at to aid in considering doubtful expressions in a decree, it is shown unmistakably that the decision was put on that ground alone." Citing Gross v. United States Mortgage Co. supra.

Adams v. Burlington & M. R. R. Co., 112 U. S., 129 5 Sup. Ct. Rep. 80.

In a case arising in New York it was said, without referring to or quoting any New York statute as to filing or recording of the opinion of the court of appeals: "But in view of what was said in Murdock vs. Memphis, 20 Wall. 590, in Gross v. United States Mortgage Co., 108 U. S. 477 and in Adams Co. v. Burlington & M. R. R. Co., 112 U. S. 123, we think that we are at liberty to look into the opinion of the court of appeals, a copy of which duly authenticated is transmitted to us with the record in compliance with our Eighth Rule for the purpose of aiding in determining what was decided by that court."

Fire Ass'n vs. State of N. Y., 119 U. S., 116; 7 Sup. Ct. Rep. 111.

In a case from Michigan where the constitution simply requires that the opinions of the supreme court shall be in writing signed by the judges concurring therein and filed by the clerk, such an opinion was examined in

order to ascertain whether a Federal question was therein decided.

Detroit City Ry. Co. vs. Guthard, 114, U. S., 133, 137; 5 Sup. Ct. Rep. 811.

"The statute of Kentucky requires written opinions to be delivered by the court of appeals in all cases and to be recorded by its clerk. * * * * * By the settled course of decision under the existing judiciary acts of the United States, this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court." Citing cases supra.

Kreiger v. Shelby R. Co., 125 U. S., 44; 8 Sup. Ct. Rep., 755.

"In respect of the supreme court, it is provided by section 5 of the Code of Civil Procedure of Washington that 'in the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated'; and by section 68 and 73 it is made the duty of its clerk to record its proceedings, and enter its orders, judgments, and decrees. And the thirteenth rule of the court provides that 'all opinions of the court shall be recorded by the clerk in a well-bound volume and the original filed with the papers in the case.' 2 Wash. St. 689,

It is the settled course of decision that this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court. Kreiger v. Railroad Co. 125 U. S., 39, 8 Sup. Ct. 752."

Dibble v. Bellingham Bay Land Co., 163 U. S., 69; 16 Sup. Ct. Rep., 941.

It is provided by rule twenty-five of the supreme court of South Dakota as follows: "Opinions of the court

shall be reduced to writing and filed with the clerk in open court."

The statutes contain the following provisions: "He (clerk of the supreme court) must not allow any written opinion of the supreme court to be removed from his office, except by the reporter; but shall permit anyone to examine or copy the same."

Revsd. Political Code 629.

"He (clerk of the supreme court) shall keep his office at the seat of government, and shall keep a complete record of all the proceedings of the supreme court"

Revsd. Political Code, Sec. 630.

"When the opinions of the supreme court are filed and the minutes thereof entered by the clerk, the reporter may take and retain the same * * * * * for such reasonable time as he may require to prepare the report thereof, when they shall be returned to and remain in the office of the clerk."

Revsd Political Code, Sec. 634.

The opinions of the supreme court are treated as its decisions. It will be noticed that in the second opinion in this case the court refers to its first opinion as its "decision"; "an extended statement of the facts will be found in our former decision, wherein it is held that notices of forfeiture addressed to Rufus Wilsey, etc., were sufficient in form." (Trans. p. 21, fol. 40.)

"In all cases the supreme court shall remit its judgmen or decision to the court from which the appeal or writ of error was taken, to be enforced accordingly."

Revsd. Code, Civ. Procedure, Sec. 464.

"All state reports published by said reporter under

this article shall be considered and received in all courts of this state as evidence of the decisions of the supreme court."

Revsd. Political Code, Sec. 644.

From the foregoing quotations it is apparent: (1) That opinions of the supreme court of South Dakota are required by law to be filed with the clerk and retained by him as a part of his official records; and (2) That the opinion of the court is treated, not only by custom, but by statute, as its decision, and is made by statute legal evidence of such decision.

(B)

Both parties to this action claim title under the United States statutes (Sections 2319 and 2324); the plaintiffs in error under the statute as a whole, the defendants under that portion dealing with the forfeiture of the interests of a delinquent co-owner.

The determination of the controversy depends upon the interpretation or construction of this forfeiture provision. If it is construed in one way, plaintiffs' title is sustained; if the other, plaintiffs' title is defeated, and at the same time defendants' title is thereby established. No question of state or local law intervenes; it is solely and purely a question of Federal law, depending entirely upon the proper construction of a Federal statute.

Plaintiffs' title is not merely deraigned through or from the United States. It is true it depends upon a Federal statute in the first instance for its source; but more important than that it depends for its maintainance and continued existence upon the proper construction of that statute. It is not a question solely of whence was the title derived, but when and how is it divested?

Is it divested by a notice addressed to one deceased? Is it divested by an eighty-five days publication of forfeiture notice? If it is, then a title claimed under a United State statute is lost by reason of a particular construction of that statute; whereas it would have been maintained by the opposite construction. The United States statute vests title in the plaintiffs in error until a certain contingency; upon the happening of that contingency plaintiffs' title is divested. The question as to whether under the statute that contingency has happened is certainly a Federal question; if it is decided that the contingency has happened and the title divested, it is manifestly a decision adverse to a claim of title under a statute of the United States. Plaintiffs in error claim that title under a Federal statute is still in them, despite certain forfeiture proceedings; defendants in error claim such title has been divested thereby. Is a decision adverse to plaintiffs' claim any the less against their title because that decision is favorable to defendants' claim? Certainly not, since both parties are claiming under a Federal statute.

That which gives a semblance of reason to defendants' contention is the fact that plaintiffs' divestiture of title necessarily results in defendants investiture of the same title. If this were not the case, and if defendants' interpretation of the statute simply resulted in defeating the title of plaintiffs in error, and in forfeiting it to the United States, there would be no question but what plaintiffs in error had claimed a title under a statute of the United States, and that the decision of the state court had been adverse to such title. The decision of the question in this case is twofold in its effect; it first defeats plain-

tiffs' claim of title; it then vests that title in the defendants. The fact that it is in its effect favorable to defendants in error does not make it any the less adverse to plaintiffs. Plaintiffs have lost their title by reason of the adverse construction of a Federal statute just as truly as though defendants in error had not gained that title; just as truly as though plaintiffs' title had been forfeited to the United States instead of to the defendants.

The case of DeLamar's Gold Mining Company v. Nesbitt, 177 U. S., 523; 20 Supreme Court Reporter, 715 which is relied upon by defendants in error does not hold to the contrary. In that case the crucial question was whether the Nesbitt Brothers had such an interest in the "Fraction" mine as would enable them to claim the benefit of the acts of Congress dispensing with the necessity of annual representation work for the years 1893 and 1894 (28 Stat. At L., 6 Chap. 12 and 114 Chap. 142.) This question depended solely upon the effect of certain execution sales under which the Nesbitts supposed they had acquired title. These sales and the judgments of justice courts of the state on which they were based were held void by the state court; which held nevertheless that under the circumstances the Nesbitt Brothers, with their co-tenant, Borth, had such an interest in the "Fraction claim as enabled them to take advantage of the acts in question, and thereby save a forfeiture of their mining location. The effect of this holding was necessarily adverse to the mining company and the validity of its mining location; but the adverse effect was due primarily to the decision of the local question though the acts of Congress and their application were incidentally also involved. In other words, the controversy really hinged

on the effect of the execution sale proceedings under which the Nesbitt Brothers claimed title, which was a matter entirely of local law and involved no Federal question. This is manifestly the view taken by this Court, for it says: "No Federal question was presented by the pleadings in the case and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which the Nesbitt Brothers had acquired the interest of De Beque and Stevens in the Fraction mine." And again: "Except so far as the case under consideration required a construction of the above mentioned acts of Congress suspending the forfeiture of mining claims, the questions were purely of a local nature and not subject to review in this court."

DeLemars Co. vs. Nesbitt, 177 U. S. 523, 20 Sup. Ct. Rep. 717.

This DeLamar case would support the contention of defendants in error if the plaintiffs in error were seeking to defeat defendant's title by reason of state law, as the DeLamar Company was seeking to defeat Nesbitts' title by reason of the invalidity of the execution sale proceedings had under state court judgments. If the plaintiffs in error in this case were claiming under some state statute while the defendants claimed under the forfeiture proceedings prescribed by the United States statute (section 2324) then a decision for defendants manifestly would oust this Court's jurisdiction. Not so, however where both parties claim under varying constructions of a Federal statute.

The case at bar falls squarely within the general rule announced in the DeLamar case: "To raise a Fed-

eral question the right must be one claimed under a particular statute of the United States, the validity, construction, or applicability of which was made the subject of dispute in the state court; and the decision on such statute must have been adverse to the plaintiffs in error."

II.

(A)

Upon the merits defendants in error suggest that the question decided by the first opinion of the State Supreme Court as to the form of the notice of forfeiture is not before this Court because this writ of error was not sued out on the former judgment of that Court.

A writ of error could not have been sued out on that judgment because it was not a final judgment, but remanded the case for further proceedings in the lower court.

And again, the second opinion of the court not only refers to, but necessarily adopts, the first opinion; since the second opinion could not have been maintained without impliedly, if not expressly, re-asserting the proposition determined by the first, viz, that the notice of forfeiture in question was sufficiently addressed. The state supreme court in its opinion on the second appeal says: "An extended statement of the facts will be found in our former decision wherein it is held that notice of forfeiture addressed to Rufus Wilsey etc. were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual for the reason that they were not published during the entire period prescribed by the Federal statute." etc. (Trans. p. 21, fol. 40.)

It is clear that in affirming the lower court's judgment the supreme court of the state determined: (1) That the notices of forfeiture in question were sufficiently addressed, and (2) That they were published for a sufficeint length of time. Both of these propositions were actually and necessarily determined in the opinion of the state supreme court.

(B)

The difference between the notice required by United States Revised Statutes, section 2324 to be given a delinquent co-owner, and that required by section 2325 to be given of an application for patent is that the former is expressly required to be given to a definite person, to-wit: "The co-owners may * * * * * give such delinquent co-owner personal notice in writing or notice by publication" etc., whereas in the latter case the notice is general and required to be given to no one in particular, to-wit: "The Register of the Land Office * * * * * shall publish a notice that such application has been made." etc.

The same is true with reference to the South Dakota statute for the foreclosure of mortgages by advertisement The notice is general and not special; is meant for all the world and not for any one individual; as the supreme court of the state itself says: "By the statute of this state no notice of sale is required to be served upon anybody; general notice to all interested is given by publication; there are no parties to the proceeding as in an action for foreclosure."

Reilly v. Phillips, 4 S. D., 640; s. c. 57 N. W. Rep., 780.

Immediately upon the death of Rufus Wilsey it is

conceded that his heirs became the owners of his half interest in the "Golden Sands" claim; they thereby became co-owners in that claim with C. H. Havens. The question as to whether notice "to Rufus Wilsey, his heirs, administrators, and to all whom it may concern" is sufficient as a notice to those heirs under the Federal statute which requires that such delinquent co-owner be given personal notice in writing or by publication is sufficiently discussed in our original brief. So also is the question as to the publication of the notice.

Respectfully,

EBEN W. MARTIN,

NORMAN T. MASON,

Attorneys for Plaintiffs in Error.

Deadwood, South Dakota, April, 1904.

FILE COPY.

IN THE

SUPREME COURT

OF THE

UNITED STATES

Silas Supreme Court U. S.
FILED
APR 1904
JAMES H. McKENNEY,
Clerk.
WITHDRAWN

October Term, 1903.

Silas Supreme Court U. S.
FILED
APR 11 1904
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No. 220.

William S. Elder, as Administrator of the Estate of Rufus Wilsey, Deceased; Elizabeth Wilsey, et al.,

PLAINTIFFS IN ERROR,

vs.

The Horseshoe Mining and Milling Company, Joseph M. Thomas, et al.,

DEFENDANTS IN ERROR,

In Error to the Supreme Court of the State of South Dakota.

BRIEF OF DEFENDANTS IN ERROR

MOODY, KELLAR & MOODY,
Attorneys for Defendants in Error.

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STATEMENT.

The statement contained in the brief of plaintiffs in error we think defective in that it only presents one of the defenses interposed by the defendants in error, each of which was adjudi-

cated by the trial court in favor of defendants in error, and each of which was sufficient in itself to dispose of the controversy upon its merits.

The defendants in error, who were defendants below, interposed to the claim of plaintiffs three defenses:

(1) The loss of the title of Rufus Wilsey, ancestor of plaintiffs in error, of the undivided one-half interest in the Golden Sand lode through certain forfeiture proceedings prosecuted by one C. H. Havens, the co-owner of said Wilson, the said Havens having subsequently conveyed to the defendants in error.

(2) That the ground in controversy, which was formerly called the Golden Sand lode, was re-located by one Joseph M. Thomas as the North lode, and that to the application of said Thomas for patent to said North lode no protest or adverse was made. The defendants in error succeeding to the title thus acquired by the said Thomas.

(3) That plaintiffs in error were barred and estopped from maintaining this action by reason of their gross laches and unexcused neglect in reference to the property in controversy.

Each of said defenses is fully covered by the pleadings and by the decision of the trial court, which, under the laws of South Dakota, must be in writing and must separately state the Findings of Fact and the Conclusions of Law.

(Transcript pages 10 to 18 inclusive, and particularly Conclusion 3 and 4, on page 18.)

The judgment of the trial court was based upon said written decision. (See judgment transcript, page 19.)

The judgment of the Supreme Court of South Dakota now before this court for review affirmed the said decision and judgment of the trial court. (See top page 20, transcript of record.)

I.

THIS COURT HAS NO JURISDICTION AND THE WRIT OF ERROR SHOULD BE DISMISSED.

"It is the settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or Laws of the United States another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the federal question to sustain the judgment, this court will not review the judgment."

Jenkins, assignee, vs. Loewenthal,
110 U. S. 222.
s. c. 3 Sup. Ct. Rep. 638.
Adams vs. Burlington & M. R. R. R. Co.,
112 U. S. 123.
s. c. 5 Sup. Ct. Rep. 77.
Murdock vs. Memphis, 20 Wallace, 590.
Eustis vs. Bolles, 150 U. S. 361.
s. c. 14 Sup. Ct. Rep. 131.
California Powder Works vs. Davis,
151 U. S. 389.
s. c. 14 Sup. Ct. Rep. 350 at 351.
Missouri Pacific R. R. Co., vs. Fitzgerald,
160 U. S. 556.
s. c. 16 Sup. Ct. Rep. 389 at 399.
Weyerheusen vs. Minnesota, 176 U. S. 550.
Harrison vs. Morton, 171 U. S. 38.
s. c. 18 Sup. Ct. Rep. 743.
De Saussure vs. Gaillard, 124 U. S. 216.
s. c. 8 Sup. Ct. Rep. 1053.
Roby vs. Colehour, 146 U. S. 153.
Pittsburg, etc., Co., vs. Cleveland Co., 178 U. S. 270.
s. c. 20 Sup. Ct. Rep. 931.
Chappel Co. vs. Sulphur M. Co., 172 U. S. 465.
Peirce vs. Somerset Ry., 171 U. S. 641.
s. c. 19 Sup. Ct. Rep. 64.

In Missouri Pacific R. R. Co. vs. Fitzgerald, 160 U. S. 556, the court said:

> "We repeat what we said in California Powder Works vs. Davis, 151 U. S. 389, that 'It is axiomatic that in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.'"

Moran vs. Horsky, 178 U. S. 205.
s. c. 20 Sup. Ct. Rep. 857.
Johnson vs. Risk, 137 U. S. 300.
s. c. 11 Sup. Ct. Rep. 111.
Snell vs. City of Chicago, 152 U. S. 191.
s. c. 14 Sup. Ct. Rep. 489.

In Jenkins vs. Loewenthal, 110 U. S. 222 supra, two defenses were interposed, one presented a federal question, the other did not. This court said:

> "Either of these defenses if sustained bars the action. The second involves a federal question, the other does not. The court in its decree sustained them both, and, among other things, found as a fact that the defendants were innocent purchasers for value. As this finding is broad enough to maintain the decree even though the federal question involved in the other defense was decided wrong we affirm the decree without considering that question or expressing any opinion upon it."

In Murdock vs. Memphis, 20 Wallace 590, the court said: "Why should a judgment be reversed for an error in deciding the federal question when the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below after they have cor-

rected the error in the federal question? We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State Court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated in the statute we must receive the decision of the State Courts as conclusive. But when we find that the State Court has decided the federal question erroneously, then to prevent a useless and profitless reversal which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or, on the other hand, whether there exist other matters in the record actually decided by the State Court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court."

We submit that the case at bar comes clearly within the rule of Jenkins vs. Loewenthal, 110 U. S. 222 supra. The findings in the case at bar fully sustain the defenses (a) of laches and estoppel, and (b) of failure to protest or adverse against the patent application of Thomas. Neither of these is a federal question.

DeLamar's Nevada G. M. Co. vs. Nesbitt, 177 U. S. 523.
s. c. 20 Sup. Ct. Rep. 715.
Blackburne vs. Portland G. M. Co., 175 U. S. 571.
s. c. 20 Sup. Ct. Rep. 222.
Weyerheusen vs. Minnesota, 176 U. S. 550.
Adams Co. vs. Burlington & M. R. R. R. Co.,
112 U. S. 123.
s. c. 5 Sup. Ct. Rep. 77.
Pittsburg Co. vs. Cleveland Co., 178 U. S. 270.
s. c. 20 Sup. Ct. Rep. 931.
Moran vs. Horsky, 178 U. S. 205.
s. c. 20 Sup. Ct. Rep. 857.

In the last named case the defense of laches was sustained against the assertion of a right to a mining claim after some fourteen years of abandonment.

In Adams vs. Burlington & M. R. R. R. Co., 112 U. S. 123, a finding in the record sustaining the defense of estoppel was held sufficient to deprive this court of jurisdiction.

Under the law and practice of the State of South Dakota the written decision of the trial court, consisting of separate Findings of Fact and Conclusions of Law, is a part of the record, and judgment must be entered according to such decision. It is also a part of the judgment roll.

> "Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision, and no judgment shall be rendered or entered until after the filing of such decision."

(Section 5066 Comp. Stats. of Dak. 1887. Same section: Sec. 276 Code of Civ. Proc. of Rev. Codes of S. Dak. 1903.)

> "In giving the decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly."

(Sec. 5067 Comp. Stats. of Dak. 1887. Same section: Sec. 277 Code of Civ. Proc. of Rev. Codes of S. D. 1903.)

> Garr, Scott & Co. vs. Spaulding, 51 N. W. 866 at 868.
> Colonial Mortgage Co. vs. Bradley,
> 55 N. W. 1108 at 1109.

> "Upon an appeal being perfected, the clerk of the court from which the appeal is taken shall forthwith transmit to the Supreme Court, if the appeal is from a judgment, the judgment roll."

(Sec. 5217 Comp. Stats. of Dak. 1887. Same section: Sec. 443 Code of Civ. Proc. of Rev. Codes of S. Dak. 1903.)

> "Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment,

shall attach together and file the following papers, which shall constitute the judgment roll: (1) In case the complaint be not answered by any defendant the summons and complaint, or copies thereof, proof of service and that no answer has been received, the report if any, and a copy of the judgment. (2) In all other cases, the summons, pleadings, or copies thereof, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment."

(Sec. 5103 Comp. Stats. of Dak. 1887. Same section: Sec. 319 Code of Civ. Proc. of Rev. Codes of S. Dak. 1903.)

The decision of the trial court is a part of the judgment roll.

Colonial Mgt. Co. vs. Bradley, 4 S. D. 158.
s. c. 55 N. W. 1108.
Garr, Scott Co. vs. Spaulding, 2 N. D. 414
s. c. 51 N. W. 867.

The opinion of the court is no part of the record on appeal.

Vol. 15 Ency. Pl. & Pr. p. 309 and 311, and cases cited.

This court in construing the Judiciary Act of 1789, Section 25, held that it would not consider the opinion of the lower court for the purpose of ascertaining whether a federal question had been decided.

Gibson vs. Choteau, 8 Wallace 314.
s. c. 4 Sup. Ct. Rep. 340.
Rector vs. Ashley, 6 Wallace 142.
s. c. Bk. 18 L. C. P. Co. 753.
Williams vs. Norris, 12 Wheat. 117.
s. c. 6 L. C. P. Co. 571.

It was later held, construing the Act of February 5th, 1867, that in cases arising in the States of Illinois and Louisiana this court would consider such opinions in view of the peculiar statutes of those States making such opinion a part of the record.

Except in the case of Murdock vs. Memphis, 20 Wallace 590, we have found no case in which this question was specifically raised, except as stated in cases arising in States of Louisiana and Illinois. Moreover, we think it will be found that in every instance where reference has been made to the opinion of the lower court as to the points upon which a judgment was rendered that under the law and practice of the particular State in which such judgment was rendered there was no mandatory statute requiring a written decision of separate findings and conclusions as a necessary prerequisite upon which to predicate the judgment of the trial court such as is the law in the State of South Dakota. In Murdock vs. Memphis, 20 Wallace, 590, after holding that reference might be made to the opinion of the lower court to ascertain what was decided, the court continued as follows:

> "But after all, the record of the case, its pleadings, bills of exception, judgment, evidence, in short its record, whether it be a case in law or equity, must be the chief foundation of the inquiry, and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

We submit that in the case at bar this court is under no necessity of permitting the opinion of the Supreme Court of South Dakota, which is not a part of the record, to overthrow the record, which clearly shows by the findings and conclusions, by the judgment of the trial court based thereon, and by the judgment of the Supreme Court of South Dakota affirming the same, that other than federal questions upon which this judgment can be based were actually decided in favor of the defendants in error.

In Roby vs. Colehour, 146 U. S. 153, s. c. Sup. Ct. Rep. 47, neither the opinion of the trial court nor of the Supreme Court

of the State disclose that any question of a federal nature was passed upon, yet the court held that the necessary effect of the decree was to determine adversely to the plaintiff in error certain rights claimed by him in his pleadings, and therefore retained jurisdiction of the case. If the opinion of both the trial court and the Supreme Court of the State can be disregarded for the purpose of ascertaining from the record, that a federal question was involved, can it be successfully urged that the opinion shall be controlling where, as in the case at bar, the record affirmatively shows that the case was disposed of upon the merits upon grounds not of a federal nature? Apply the reasoning in Roby vs. Colehour to the case at bar. Is not the necessary effect of the findings and conclusions of the trial court, to dispose of the cause on grounds not of a federal character?

(B)

The jurisdiction of this court is invoked under Revised Statutes, Section 709 (Comp. Statutes of U. S. 1901, p. 575, West Pub. Co.)) by reason of the fact that some title or right is claimed under a statute of the United States, and that the decision of the lower court is against such title or right.

Where the jurisdiction of this court depends upon the denial by the State Court of a title or right claimed under a statute of the United States it must appear o n the record that such title or right was specially set up and claimed under some particular statute, and that the decision of the lower court was against the right or title so set up or claimed.

DeLamar's Nevada G. M. Co. vs. Nesbitt, 177 U. S. 523.
s. c. 20 Sup. Ct. Rep. 715.
F. G. Oxley Stave Co. vs. Butler Co., 166 U. S. 648.
s. c. 17 Sup. Ct. Rep. 709.
Mutual Life Ins. Co. vs. MsGrew, 188 U. S. 291.
s. c. 23 Sup. Ct. Rep. 375 at 378.
California Powder Works vs. Davis,
151 U. S. 389.
s. c. 14 Sup. Ct. Rep. 350.

The only federal statute under which the plaintiff in error claims any right or title is Section 2319 of the U. S. Revised Statutes. But the trial court and the Supreme Court of South Dakota did not deny the plaintiffs in error any right or title under this statute, nor under any other federal statute under which the plaintiffs in error claimed any right or title. The lower courts acknowledge the original title of the ancestor of plaintiffs in error by virtue of the due location of the Golden Sand mining claim. Having acknowledged and held valid the title of the ancestor of plaintiffs originally, the court then proceeded to examine the right and title specially set up and claimed by the defendants in error under and by virtue of Section 2324 of the U. S. Revised Statutes (U. S. Comp. Laws 1901, vol. 2, page 1426), providing the method of forfeiting out a delinquent co-owner. The courts below construed this section in such manner as to hold that the forfeiture proceedings of the grantors of defendants in error were valid and sustained the right and title thus specially set up by the defendants in error. The mere fact that the federal statute has been construed by the lower court is not sufficient grounds upon which to base the jurisdiction of this court. There must be not only a construction of the statute, but such construction must deny to the plaintiffs in error some right or title specially set up and claimed by them under such statute thus construed. (See cases just cited, supra, and authorities therein referred to.) The statute construed in the case at bar was invoked by the defendants in error, and its construction was in favor of the right and title by them set up.

We submit that the case above cited of De Lamars Nevada Gold Mining Co. vs. Nesbitt, 177 U. S. 523, is decisive of this question. That was an adverse mining suit. The defendant in error had invoked the provisions of the Acts of Congress of November 3rd, 1893, and July 18th, 1894, suspending the forfeiture of mining claims for failure to do the required amount of

work, and by virtue of the construction which the Supreme Court of the State of Nevada placed upon these two Acts of Congress the defendants in error prevailed in the court below. The plaintiffs in error in that case invoked the jurisdiction of this court upon the grounds: First, that under the provisions of the United States Revised Statutes, sections 2325 and 2326, providing for the trial of adverse claims to mining patent, a federal question was necessarily involved; and second, t hat a federal question was involved by reason of the construction of the Acts of Congress of November 3rd, 1893, and July 18th, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. This court held against the contention of plaintiffs in error on both points, holding, first, that the construction of said sections of the Revised Statutes providing for the trial of adverse claims to mining patents did not involve a federal question; and, second, that while a federal question was undoubtedly raised in the case by the construction of the Acts of Congress of November 3rd, 1893, and July 18th, 1894, yet that this federal question was raised by the defendants in error and not by the plaintiffs in error, and that the decision of the court was in favor of the right claimed under this particular statute. The court in its opinion said:

> "To raise a federal question the right must be one claimed under a particular statute of the United States, the validity, construction or applicability of which was made the subject of dispute in the State Court; and the decision upon such statute must have been adverse to the plaintiff in error. No federal question was presented by the pleadings in the case, and the whole gravamen of defendant's argument was, not the denial to it of any right under the mining laws of the United States, but the invalidity of the proceedings under which Nesbitt Brothers had acquired the interest of De Beque and Stevens in the Fraction mine. There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the Acts of Congress of November 3rd, 1893,

and July 18th, 1904, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of, and not against, the right claimed under this statute, and of this construction the plaintiff in error is in no position to take advantage, as it made no claim under those statutes. This subject was considered in the case of Missouri vs. Adriano, 130 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the State Constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his foreign birth, but claimed that, under Rev. Stat., Section 2172, he became a citizen by the naturalization of his father. The decision of the court was in his favor, and it was held that the relator had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of his right to a writ of error. It was said that the right or privilege must be personal to the plaintiff in error, and that he was not entitled to a review where the right or privilege was asserted by the other party and the decision was in favor of that party and adverse to himself. It is manifest that the object of Section 709 was not to give a right of review wherever the validity of an Act of Congress was drawn in question, but to prevent States from frittering away the authority of the federal government by limiting too closely the construction of federal statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed."

(2)

IT IS CONTENDED THAT THE NOTICE OF FORFEITURE WAS INSUFFICIENTLY ADDRESSED.

(A)

This question was considered by the Supreme Court of South Dakota in the first appeal in this case, on which appeal the

present defendants in error prosecuted an appeal to the Supreme Court of South Dakota and reversed the judgment of the lower court, and the judgment of the Supreme Court on that appeal was rendered May 6th, 1897. (Transcript of record, pages 22 to 29. Reported 9 S. D. 636, s. c. 70 N. W. 1060.)

On the second trial of the cause judgment of the trial court was in favor of the defendants, and the judgment of the Supreme Court affirming such judgment was rendered October 2, 1901. (Transcript pages 19 and 20. Reported 15 S. D. 124, s. c. 87 N. W. 586.)

In this last appeal the question was not urged or passed upon by the Supreme Court as to whether the notice of forfeiture was sufficiently addressed. The only question passed upon in the opinion of the court was as to the sufficiency of the publication of the notice. If a strict construction is to be invoked under which the opinion of the Supreme Court of South Dakota is to absolutely fix and limit the questions decided, for the purpose of conferring jurisdiction upon this court, it seems to us that logically the only question which this court can consider is as to the sufficiency of the publication of the notice, this writ of error not having been sued out to the former judgment of the Supreme Court, and the time within which to sue out such writ having elapsed.

(B)

Revised Statutes U. S., Section 2324, contains no requirement as to any address or heading of the notice. It is similar in this respect to the notice required to be published when application for patent is made, which notice is not required to be addressed to any one, nor as a matter of practice is addressed to any one. If no adverse claim is filed within sixty days after first publication of such notice for patent the rights of all parties holding adverse claims are cut off. It might be much more con-

sistently contended that the notice of application for patent should be directed to the specific persons whose rights will be affected by the allowance of the patent, such as conflicting claimants, lien holders, etc., than that a notice of forfeiture should by name specify the co-owner whose rights are to be affected by the forfeiture proceedings. In case of the notice of the application for patent, such application is for the entry of a certain specified mining claim, the name of which is given, together with its description by metes and bounds. As a matter of fact to the layman such description is meaningless. The owner of an adjoining mining claim which may be prior in point of time and validity and which may overlap the junior location can only safely protect himself by keeping careful watch of the actual boundaries of his own claim upon the ground, and by thus advising himself whether or not a survey for patent for the hostile claim has been made, and whether the patent stakes have been so placed as to include any of his ground. Even though he should carefully read the published notice of every application for patent printed in all of the newspapers in which it might be possible to print such notice, it would be impossible for him to protect himself against an adverse application. The application for patent may be for a claim the name of which he has never heard. In short, there is absolutely nothing in such notice which as a matter of practical experience advises the owner of the prior location of the fact that a subsequently located claim by the particular name in question is passing to patent. We have an illustration of this in the case at bar. Joseph Thomas relocated the Golden Sand lode under the name of the North lode, and applied for patent for the North lode. A notice of application for patent for the North lode was published, giving its description by metes and bounds. The heirs of Wilsey, who are the plaintiffs in error, might have read the notice of such application for patent for the North lode numbers of times, and yet never have thought that the patenting of the North lode to Joseph Thomas

would in any wise affect their rights as owners of the Golden Sand lode, although as a matter of fact the exterior boundaries of the two claims were identical, and the North lode was the junior location. Werefer to this for the purpose of calling the court's attention to the policy of the United States in the enactment of its statutes regarding the development of its mineral resources, and to show that it has been the policy of the government to create an expeditious and inexpensive system by which the title to such mineral ground may be transferred to those entitled thereto.

The objections urged by plaintiffs in error to the notice of forfeiture are not in our judgment tenable.

The notice is addressed: "To Rufus Wilsey, his heirs, administrators, and to whom it may concern." What is the object of the notice? Is that object accomplished by a notice so addressed or entitled? Suppose the notice so addressed had in fact been personally served by the delivery of a copy thereof to Elizabeth Wilsey, one of the heirs. Would she be heard to say that she had not received notice of her delinquency simply because her name was not inserted in the notice? Assuredly not. Rufus Wilsey being dead she knew under the law that she was an heir. The notice referring in terms by name to the Golden Sand lode her attention would be specifically called to the property affected by the proceedings. There could be no doubt as to the advising quality of such a notice. It must be seen at a glance that the notice in question is much more definite and specific in its informative character than the notice for application for patent given under quite a similar statute.

Logically the notice if sufficient when personally delivered must be sufficient when served by publication. The law making power evidently contemplated that the service would be by publication inasmuch as the statute prescribes no conditions what-

ever under which the notice shall be personally served, but it is left entirely optional with the party giving the notice, clearly indicating that the notice would ordinarily be served by publication. Would a notice directed "To Elizabeth Wilsey, etc.,' and published the required length of time in the "Belt Daily Herald," published in Lead City, South Dakota, have been any more likely to convey the information to Elizabeth Wilsey, who lived in the State of Iowa, than the publication of the notice in question?

There is no reason why the court should be over indulgent to that co-owner who has been deliberately delinquent in the performance of that duty required by the government as a condition upon which he is permitted to hold the title to its public mineral lands. It is the policy of the law to develop the mineral resources. It should be the policy of the law to protect that particular co-owner who in good faith recognizes such policy. Theheirs of Rufus Wilsey knew of the existence of this claim, and for fourteen years abandoned it, knowing that the necessary result of their conduct would be to subject the claim to relocation by outside parties or to compel their co-owner to perform their share of the labor..

The view of this question taken by the Supreme Court of South Dakota has heretofore received the uniform sanction of the United States Land Department. When an application for patent is made an abstract of title is furnished; and when it appears from such abstract that a notice of forfeiture has been published for the proper time, and an affidavit filed showing that no contribution has been made as thereby required, the title under such showing is held to be sufficient. As suggested by the Supreme Court of South Dakota in its first opinion, if the construction contended for by plaintiffs in error is correct it would be incumbent upon the department to require proof that

the co-owner was living at the time the notice was published, or if dead that an administrator was appointed, and that each of the heirs was duly served:

> "With such a construction the provisions of the forfeiture statute would be worthless, and instead of conferring a benefit upon the co-owner would be a delusion and a snare. No person could safely invest in a claim in the chain of title to which there was such a notice, however regular it might appear to be by the record." (Elder vs. Horseshoe Min. Co., 9 S. D. 637.)

The notice in question is similar to the notice required by the statute of South Dakota to be given in the foreclosure of a mortgage by advertisement. The statute of South Dakota provides for the foreclosure by advertisement of mortgages containing a power of sale. The statute providing as follows:

> "Notice that such mortgage will be foreclosed by sale of the mortgaged premises or some part of them must be given by publishing the same for six successive weeks at least once in each week in a newspaper of the county where the premises intended to be sold or some of them are situated, if there be one, and if not then in the nearest newspaper published in the territory."
>
> (Sec. 5414 Comp. Statutes S. Dakota, 1887.)
>
> "Every notice must specify: (1) The names of the mortgagor and mortgagee, and the assignee if any. (2) The date of the mortgage. (3) The amount claimed to be due thereon at the date of the notice. (4) A description of the mortgaged premises conforming substantially with that contained in the mortgage; and (5) The time and place of sale." (Sec. 5415 Comp. Statutes S. Dakota, 1887.)

The Supreme Court of South Dakota in construing this statute held:

> "By the statute of this state no notice of sale is required to be served upon anybody. General notice to all interested

is given by publication. There are no parties to the proceeding, as in an action for foreclosure; and yet the proceeding, where authorized by a power of sale in the mortgagee, was, without question, intended to take the place of a foreclosure by action, and to have the effect of an old foreclosure in equity. The statute having made no provision for service of notice of the sale either upon heirs or others interested in the mortgaged property, such service if made would be entirely voluntary on the part of the mortgagee and could add nothing to the legal effect of the sale."

By such notice and such proceedings the claims of all persons including minor heirs of the mortgagor are cut off. As the state made no provision for directing the notice to any particular persons the court declined to inject such provision by construction.

Reilly vs. Phillips, 4 S. D. 604, s. c. 57 N. W. 780.

(C)

It is contended by counsel that the administrator is a necessary party to a complete determination of the title of real property, and that therefore it is necessary that the name of the administrator should be inserted in the notice of forfeiture. The same reasons which would obviate the necessity of specifying by name each of the heirs would also obviate the necessity of specifying the administrator.

An additional and conclusive answer to this contention is found in the statute itself, which provides that notice of forfeiture shall be given co-owners. The statute makes no provision whatever for the giving of any notice to lienors. The Supreme Court of South Dakota has decided that under the laws of that State the title to real estate upon the death of an owner devolves upon the heirs and vests in them immediately. An administrator has merely a lien upon such property for certain limited purposes. Upon well recognized principles the de-

cision of the South Dakota Supreme Court upon that question is conclusive upon this court.

Elder vs. Horseshoe Min. Co., 9 S. D. 636 at page 642.

The administrator of the Wilsey estate was therefore not a co-owner with Havens in the Golden Sand claim at any time and was therefore not entitled to any notice. It is contended by counsel that notwithstanding the fact that the statute only requires a notice of forfeiture to be given co-owners, yet the administrator is entitled to notice in order that he may be bound as to his lien upon the real estate which he holds for the purpose of paying creditors, and suggests that Havens could not have acquired a perfect title as against said administrator even by deed from the heirs of Wilsey, and therefore could not acquire title through the forfeiture proceedings. The fallacy of this contention is that counsel overlooks the fact that the administrator and creditors take whatever lien or title they may have upon the mining property in question subject to the laws of the United States, one of which laws is the forfeiture statute in question, by the express terms of which all of the liens and rights of such creditors and administrators can be disposed of by notice given, not to them, but to the co-owners only, against whose interests such liens are claimed. It is not for the creditors or administrator to say that their property except by the tors or administrator to say that their property is divested without due process of law, because they have no property, except by the indulgence and permission of the United States government, as expressed in its laws relative to mining claims. But for these laws they would have nothing. By reason of these laws they have something but that something must be accepted subject to the conditions of the statutes granting it.

The argument of counsel as set forth in paragraph 2, on page 6, of his brief, in our judgment clearly illustrates the neces-

sity of adopting the construction of this statute placed upon it by the Supreme Court of South Dakota. If the administrator of the Wilsey estate could demand that notice be directed to him, every mortgagee, miner's lienor and other person claiming any kind of lien upon the co-owner's interest could with equal reason insist that notice be directed also to him.

(D)

The authorities cited by counsel in support of the proposition that the notice must be specifically directed to the heir by name are not applicable under the statute in question. All of such authorities arise under statutes containing requirements as to the contents and form of the respective notices or process construed.

(3)

THE NOTICE OF FORFEITURE WAS SUFFICIENTLY PUBLISHED.

Counsel contends that the expression in the statute, "for at least once a week for ninety days," requires the publication both upon the first and last day. We can not approve the logic of counsel's argument. On the contrary, the very stating of the proposition as made by counsel himself, in our judgment discloses its fallacy. Counsel, on page 13 of his brief, in referring to the application of his authorities, says:

> "Furthermore, the statutes in all the foregoing cases require publication once in each week for a certain number of weeks; therefore, a publication in one week might well be held to continue throughout that week, and last for the six days immediately following; but where a publication is required once in each week for a given number of days it can not be held that the last publication extends or continues for any number of days after its completion. It is a publication for the day only on which it is made."

If this reasoning be sound, it must necessarily follow that the publication on one day in the first week would be good for that day only upon which it was made; and therefore if the publication under the statute in question was made only once the first week there would be no publication for the six other days of that week, because the requirement of the statute that the publication shall be made "for ninety days" of necessity must apply with as much force to the first seven days of the ninety as to the last seven days. How often must publication be made under the statute in question? Confessedly once only in each week. No more. If one publication the first week be sufficient, by what authority shall we say that two publications must be required for the last week? If one publication in each of the first three weeks be sufficient for the first twenty days, why shall not one publication each week be sufficient for ninety days? Notwithstanding the fact that the last publication was made on Tuesday, April 2nd, in the last week, and that the ninety days did not expire until Saturday, April 6th, upon which day the ninety days had expired.

Counsel objects to the contention of defendants in error that the phrase "at least once a week" modifies the phrase "for ninety days." We do not so contend. What we do contend is that the phrase "at least once a week" shall not be eliminated from the statute; that it shall be construed as meaning something and as not having been idly injected into the statute for no purpose. "At least once a week" fixes the number of publications, and a greater number of publications would be entirely gratuitous and superfluous. "For ninety days" fixes the time within the limits of which the delinquent co-owner may prevent a forfeiture and save his rights by the payment of his share of annual labor. Counsel argues:

> "If a publication in one week is equivalent to a publication for seven days, as defendants contend, they why is not a

publication in one month equivalent to a publication for thirty days, or a publication in one year equivalent to a publication for three hundred and sixty-five days?"

(Plaintiffs' brief, bottom of page 10.)

We answer that if the statute so provided, as in the case at bar, such publication would be sufficient. If the statute required publication once each month for forty-five days could it be logically contended that the publication in the second month must be upon the forty-fifth day? Would not a publication on the first day of July, for instance, and the sixth day of August be a compliance with such a requirement for the happening of any event on the 15th day of August? If the statute required a publication once each year for one thousand days, will it be contended that the last publication must be upon the one-thousandth day? Would not one publication in each year, providing the last publication was before the thousandth day, be a full compliance with such statute? Counsel thus states the question: "The question is: Is a publication once each day for eighty-five days a publication for 'at least once a week for ninety day?'" This is not the question. The question is: Is a publication once each week, and no more, a publication once each week for ninety days after the lapse of ninety days from the first publication? The notice in question was published in a daily paper beginning Monday, January 7th, 1889, and ending Tuesday, April 2nd, 1889. There were six publications in each week except the last. In the last week there were two publications, one on Monday, April 1st, 1889, and the last on Tuesday, April 2nd, 1889. The ninety days expired on the following Saturday, April 6th, 1889. A publication on the following Monday, April 8th, 1889, would have been in the week following the full expiration of the ninety days, and therefore entirely gratuitous.

Permit us to quote the decision of the South Dakota court in Elder vs. Horseshoe M. & M. Co., 15 S. D. 124, s. c. 87 N. W. 586:

> "The phrase 'for at least once a week for ninety days' should be rendered 'at least once a week during ninety days;' that is to say, there shall be at least one publication in each week during the prescribed period. In other words, notice shall continue ninety days, and one publication each week constitutes the notice required. Necessarily, the ninety day period begins with the first publication. In the case at bar it began on Monday, January 7th. The publication on that day was sufficient for the week beginning on that day. Publication on the following and each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7th to April 1st, both inclusive. If no publication was required after the first until the following Monday none was required after April 1st until the following Monday, April 8th, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6th. Excluding the first day ninety days ended on Sunday, April 7th. On that day the required notice had continued during ninety days, and another publication on Monday, April 8th, was wholly unnecessary. Conceding that the statute should be strictly construed we think there was a complete compliance with the provisions respecting the duration of the publication."

(....)

We submit that the authorities of the plaintiffs in error do not sustain their decision.

PLAINTIFF'S AUTHORITIES.

The first case cited by counsel is Early vs. Doe, 16 Howard 617. This was a tax sale. The statute required notice of the sale to be published "once in each week for at least twelve successive weeks." The day of sale appointed by the notice was

the 15th of November, 1848. The first publication was August 26th; the last, November 15th, the day of sale; and the court included both days in its calculation, but, as a matter of fact this made only 82 days, not 12 full weeks, and the difficulty was, as stated by Justice Nelson, not that the notice had not been published a sufficient number of times, or continued to a sufficiently late period, but that 12 full weeks notice had not been given; that is, 12 weeks had not elapsed from the first publication to the day appointed for the sale, which happened in this instance to be the last day of publication also. There can be no objection to this decision. It is clearly the law, and there is no contention here whatever that if Wilsey's heirs had come in at any time before the expiration of the 180 days from the first publication of notice they would have been entitled to redeem. But suppose in the case of Early vs. Doe, the tax sale had been set for the 18th or 20th, with the last publication on the 15th, could there have been any doubt of its legality? There would then clearly have been 12 full weeks' notice from the first publication to the day of sale, and the notice would have been published once in each week embraced in the period; yet there would have been no more time between the first and last publication than there was in the case as it was presented to the court.

The next case in counsel's brief, Wilson vs. N. W. Mut. Ins. Co., 65 Fed. Rep. 38, is like the other. It was a sale on foreclosure of mortgage. The statute required publication "once a week for at least four weeks prior to such sale." The first publication was on Friday, November 10th, 1893, the sale was made on Thursday, December 7th, and although the court included the first day, it held that the four weeks from the first day was not completed until midnight of December 7th, and that therefore a sale at two o'clock on the afternoon of that day was not four weeks from the day of the first publication. The court cites the cases from the 21 Minn., 58 Ga., 56 Mich., and 59 Ind., which are cited at the foot of page 12 of counsel's brief. There is no

disputing the correctness of this decision. And we dare say the others cited in support of it are to the same effect. That of Bacon vs. Kennedy, 56 Mich. 329, or 22 N. W. Rep. 824, is clearly so. The opinion is very short, but the court holds the sale invalid because made less than 12 weeks from the first publication. It will be noticed that in all these cases stress is laid upon the necessity of the statutory time elapsing from the day of the first publication.

The North Dakota case is another of this kind (Finlayson vs. Peterson, 67 N. W. Rep. 953). This was a foreclosure sale, and the language of the statute was, "by publishing the same for six successive weeks at least once in each week." The court says of the proceedings: "The only point urged against their legality is that the first notice of sale was not published at least 42 days before the day of sale." This is all there is in this case, and the court can readily see how inapplicable it is. The opinion is of some length and recognizes the doctrine laid down in the cases to which reference will be made later on, that the publication need not be made on the same day in each week.

This is the important point to remember here. The federal statute requires a publication "at least once a week for ninety days." Havens' notice appeared first on Monday, January 7th. If the rule of the federal courts be followed and the first publication be included, then the 90 days expired on Saturday, April 6th; and there were six publications in every calendar week but the last, and in that one there were two, towit, Monday and Tuesday, April 1st and 2nd. The service then was complete on Saturday, April 6th, and the default could properly be claimed by Havens 90 days thereafter, towit, on July 6th, 1889.

In support of the lower court's construction of the statute we cite the following

AUTHORITIES:

In Ronkensdorff vs. Taylor's Lessee, 4 Peters 349 (7 Lawyers' Co-Op. Rep. 882), the law required notice of a sale to be published "once a week for three months." The publication was had on different days in the week and there were some instances of more than a week between the publications, although made in each calendar week. For instance, there was one skip from Monday, January 6th, to Saturday, January 18th; another from Wednesday, February 19th, to Saturday, March 1st. But the court held that there was no violation of the statute in this, as the publication in each instance was made within the calendar week, and the full length of time expired from the first publication before the sale took place. The court said: "It would be a most rigid construction of the Act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particlar day of the week. If published once a week for three months the law is complied with and its object effectuated." Could there be any possible difference if, instead of saying, as the law did there, "once a week for three months," it had said "once a week for ninety days?"

The case of the State of Nevada vs. Yellow Jacket Silver Mining Co., 5 Nev. 415, is much stronger than the case at bar. The law required an election notice to be published once a week for three weeks, and the first advertisement was July 19th, and the election August 5th. The court says: "The language of the statute, it is claimed, makes it necessary that the first publication should be 21 days prior to the election; but in my opinion the statute admits of no such construction. The purpose of the advertisement is to give notice to the legal voters of the school district. When there have been three insertions of such notice upon three successive weeks the object of the publication, so far as it can be, is accomplished. The statute certainly requires but three publications of the notice; why, then, is not its full purpose

accomplished upon the expiration of the third day of publication?"

The case of Bachelor vs. Bachelor, 1 Mass. 256, is to the same effect, where it was held that "an order to give notice by publishing in a newspaper three weeks successively," was complied with by publishing in such paper in three successive weeks. In that case the paper being issued twice a week, only 12 days elapsed between the first and last advertisement; but as there was one advertisement in three successive weeks th court held it sufficient.

This is the doctrine approved by the New York Court of Appeals in two cases construing a similar statute to that of Nevada.

Sheldon vs. Wright, 5 N. Y. 497.
Alcott vs. Robinson, 21 N. Y. 150.

To the same effect see the following New York cases:

De Peyster vs. Michael, 6 N. Y. 467.
Wood vs. Moorehouse, 45 N. Y. 368.
Chamberlain vs. Dempsey, 13 Abb. Pr. 421.
Steinze vs. Bell, 12 Abb. Pr. (N. S.) 171.
Wood vs. Knapp, 100 N. Y. 109.

In the case of the Savings & Loan Society vs. Thompson, 32 Cal. 347, the question of the legality of a service of summons by publication was involved. The statute required a publication "at least once a week," and further "provided the publication shall not be less than three months." The summons was published on the 10th, 15th, 22nd and 29th of January, the 5th, 12th, 19th and 26th of February, the 5th, 12th, 19th and 26th of March, and the 2nd and 9th of April, 1865. Counsel for appellants contended, as counsel do here, that the full period of three months should elapse between the first and last publication, and

they cited the case of Early vs. Doe also. They contended that under their statute, which is like our State statute, the 10th of January should be excluded, and that therefore the counting must begin on January 11th, and that as April 9th was Sunday, that should be excluded by the statute, and therefore the service would expire April 8th. The court was not deeply impressed with this contention. Counsel must have argued there, as here, that the cases on which this judgment rests were notices requiring some act to be done on a designated day named in the notice, as the court says: "The cases arise upon notices of sheriff's sales, notices in insolvent cases, etc., under statutory provisions requiring notice to be published weekly for six weeks and three months and the like, as the case may be, before some act to be done on a designated day of which notice is given. In no one of the cases was it held that the six weeks or three months must elapse between the first and last publication, or that the notice had not been published a sufficient number of times, or to a sufficiently late day. No such question was in any of the cases. The difficulty was not that the notice had not been published the full number of times, or to a sufficiently late day, but that sufficient time had not elapsed between the first publication and the time appointed for doing the thing of which notice was given." The court considered the case of Early vs. Doe, and continues: "We think that the summons had been published for three calendar months at the close of the 9th day of April, and that the first day of the 40 within which the defendant was required to answer was on the 10th of April. But even if the three months' publication did not expire till the 10th of April there was no necessity for another publication. The 10th was in the same week with the 9th, and the summons had been published in that week. It had been published once in every one of the weeks that could by any possibility, in whole or in part, be brought into the three calendar months. This is sufficient under the decision in Ronkendorff vs. Taylor, 4 Peters

361, and we know of no decision to the contrary. The only difference it could make would be that the 40 days within which the defendant is required to answer would not commence to run till the 11th, instead of the 10th, for then the service could not be complete until the expiration of the 10th. The summons does not absolutely fix the day for answering, but requires the defendant to answer within a given number of days after the service of summons. The day for the defendant to act is left open by the summons, depending upon the time when the service is made or is complete. It is a matter of no consequence, then, whether the service was complete on the expiration of the 9th or 10th of April, for the time within which to answer did not begin to run till service was complete."

In Knowlton vs. Knowlton, 39 N. E. Rep. 595, in the Supreme Court of Illinois, it was held that an order in a suit for divorce, requiring notice to the defendant to be published "for two weeks successively" before the term of the court, was complied with by publishing once in each of two successive weeks though the first publication was made only 12 days before the first day of the term. It cites the following cases from Illinois, as supporting the same doctrine:

Madden vs. Cooper, 47 Ill. 359.
Pierson vs. Bradley, 48 Ill. 250.
Andrews vs. People, 84 Ill. 28.
Garrett vs. Mauss, 20 Ill. 549.

In Raum vs. Leech, 54 N. W. Rep. 1058, in the Supreme Court of Minnesota, the action was one to determine an adverse claim to real property, and the question of sufficiency of publication of a summons was involved. The statute required publication "once in each week for six consecutive weeks," and the only question was as to the necessity of publishing on the same day in each of the six weeks. Publication had been in a daily newspaper as follows: Tuesday, February 7th; Tuesday, Feb-

ruary 14th; Thursday, February 23rd; Thursday, March 2nd and 9th, and finally on Wednesday, March 15th. The counsel for the respondent in the court above contended that as the first publication was upon Tuesday, each succeeding one should have been on the same day of the week, and this was the view the court below had taken. But the court above reversed this decision, citing in support the case in 4th Peters and others. Says the court: "We are unable to hold that the statute has not been complied with. The summons appeared once in each of the six periods of seven days duration, beginning upon and which followed consecutively the date just mentioned, Tuesday, February 7th. We construe the statute as authorizing just such a publication. The statutory week must commence upon the day of the first publication, and there is nothing in the language used which would justify the conclusion that because the publication must be once in each week, the day of the first publication must determine the day on which each subsequent publication is to be made and that exactly seven days must intervene between each."

In Wisconsin the doctrine contended for here is recognized fully. In Cox vs. North Wisconsin Lumber Co., 51 N. W. Rep. 1130, it was held, under a statute requiring publication "once a week for six successive weeks," that where there were six publications of summons, each on the first day of six successive weeks, the publication was sufficient and the service became complete a week after the last publication, although but 35 days had elapsed between the first and last publication, and not 42, as counsel would contend here should be the case. But the court says: "It is true that there were less than 42 days from the time of the first publication to the time of the last publication; that is to say, from October 5th, 1889, to November 9th, 1889, but there were nevertheless six publications, each on the first day of six successive weeks. Of course the time for Hansen to answer did not begin to run until the expiration of the last

week, that is to say, November 16th, 1889. But the trial did not occur, and his default was not entered until April 4th, 1890, so that there can be no objection on the ground that Hansen was not in default." This is followed in the same court in Johnson et al., vs. Hill, 62 N. W. Rep. 930, in which again but 35 days elapsed between the first and last publication; but the court held that inasmuch as there were six publications, one in each week, and as more than seven weeks elapsed from the time of the first publication to the time fixed for the hearing, the statute requiring a publication for six successive weeks prior to the time of hearing was complied with.

In Wilson et ux., vs. Scott et al., 29 Ohio State 636, the question of the sufficiency of publication of notice of a foreclosure sale was involved. The statute required notice of the time and place of sale to be given for "at least 30 days before the day of sale," etc., and "where such advertisement was made in a newspaper published weekly it should be sufficient to insert the same in five consecutive numbers thereof." It seems that the first of the weekly publications was made on Wednesday instead of Thursday, the usual day of publication. But the court held: "Where the advertisement is made in a weekly paper it is not essential that it appear in numbers published on the same day of each week. It is sufficient if it be published in each number for five consecutive weeks, provided the first number be published for at least 30 days before the day of sale. In this count, the day of publication may be included, but the day of sale must be excluded. In the case before us, the first number in which the notice was inserted was published on the 1st of December, and the sale took place on the 31st of the month; we are of opinion, therefore, that the period of advertisement was sufficient, notwithstanding the first number of the weekly newspaper in which it appeared was published one day in advance of the usual day of publication."

In Martin et al., vs. Hawkins, 35 S. W. Rep. 1104, in the Supreme Court of Arkansas, the question of the sufficiency of a publication was involved under a statute requiring publication "for six weeks in succession." The first publication was made on July 30th and the last on September 3rd, 1887; the hearing under the notice took place during the September term, 1888. The court says: "The notice was published by six successive weekly insertions—the first on the 30th of July, and the last on the 3rd of September—constituting, it is true, a period of time equal to 37 days; yet, according to the weight of authorities, the notice so published must not be measured by such a restricted rule. The notice must be published six weeks in succession, six months before the beginning of the term at which the petition is to be heard. The petition in this case was called up for hearing on January 17th, 1889, and during the September term, 1888. The September term of the Garland Circuit Court began at that time on the fourth Monday of September, and it appears that this was more than six months subsequent to the 10th of September, 1887, giving the longest possible time for the notice to run—six full weeks or 42 days from the first publication and the six months thereafter before the beginning of the term." This case is another quite analagous to the case at bar, in which no particular day is designated in the notice, but the publication was completed at the expiration of the term required by law from the date of the first publication, provided in the meantime the notice has appeared at least once in each week; and that at the expiration of the term required by law from the date of the first publication, provided in the meantime the notice has appeared at least once in each week; and that at the expiration of the required number of weeks or days a further time must elapse (in the Arkansas case six months, in ours 90 days) before the default can be claimed.

In McDonald vs. Cooper, 32 Fed. Rep. 745, the same contention must have been made as here, that the full term should

expire between the first and the last publication, but the court treats the subject very summarily, simply saying: "The objection that the decree was given without the publication of the summons as directed in the order is not well founded. The summons was published six times in six successive weeks as directed, and more than 42 days elapsed from the first publication to the entry of the decree."

The court in the 32nd California case, referred to in the case of Ronkensdorff vs. Taylor's Lessee, in 4th Peters, as establishing a doctrine that has never been contradicted. A number of cases have been referred to herein as supporting the doctrine there established. The cases cited by appellant's counsel do not dispute that doctrine, but simply establish another, recognized in Early vs. Doe, in 16th Howard, and not disputed here, that the statutory time must elapse after the first publication; but that is not the question here, as this court can readily see. The question here is simply whether a statute requiring publication "at least once a week for 90 days" shall be construed as requiring what it says, once a week for ninety days, or what counsel for appellant contend, once each secular day for ninety days, or at least a first and last publication 90 days apart. Without intending to belittle counsel's contention, the writer must be excused for saying that to him such a construction seems forced, unnatural and unreasonable; that the language is too plain for any other construction than that adopted by the Supreme Court of South Dakota and recognized by the decisions here cited. There has been more than a compliance with the requirements of the statute. Instead of once a week there have been six publications in every week but the last, and in that there have been two, while the statute would have been complied with amply had there been simply a publication on Monday of each week, beginning with January 7th, terminat-

ing April 1st; then the 90 days would have expired April 6th, and the default be complete on July 6th, 1889. Upon this point, therefore, it must be apparent that the trial court was correct.

We respectfully submit: First, the writ of error should be dismissed; or, second, if this court shall retain jurisdiction the judgment should be affirmed.

CHAMBERS KELLAR,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 220.—October Term, 1903.

William S. Elder, as Administrator of the Estate of Rufus Wilsey, Deceased, et al., Plaintiffs in Error, *vs.* The Horseshoe Mining and Milling Company et al. } In error to the Supreme Court of the State of South Dakota.

[May 2, 1904.]

The plaintiffs in error, being the administrator, together with the heirs at law of Rufus Wilsey, deceased, commenced this suit in the State court of South Dakota against the defendants, and upon the trial the complaint was dismissed upon the merits; that judgment was affirmed by the Supreme Court of the State, and the plaintiffs have brought the case here. The action was commenced to obtain a decree that defendants held in trust for the plaintiffs in error an undivided one-half interest in and to the land embraced in what is called in the complaint the Golden Sand lode mining claim, and plaintiffs asked for a decree that the defendants should convey to the plaintiff in error, Elder, administrator, an undivided one-half interest therein, and for such other and further relief as might be just and equitable.

The answer contained a denial of the various allegations of the complaint and set up a defence of laches on the part of the plaintiffs in error in asserting their claim. The case went to trial before the court, and the following facts were found:

In January, 1878, Rufus Wilsey and Charles H. Havens located a mining claim near Bald Mountain, in the Whitewood mining district, Lawrence County, South Dakota, by discovering mineral-bearing rock in place, sinking a shaft, posting discovery notices and planting boundary stakes; and on May 13 of the same year they filed for record their location certificate, which was then recorded. On June 12, 1878, Wilsey died, and soon thereafter the plaintiffs, his heirs at law, were informed of his death. They knew that he had left property, and from a time shortly after his death corresponded with different attorneys and others residing in the Black Hills, trying to get something out of the estate, but, until the arrangement was made with the attorneys under which this action is brought, made no progress towards a settlement. From the time of the death of Wilsey, in 1878, up to December, 1893, the heirs of Wilsey did nothing towards contributing or offering to contribute towards paying for the annual labor made necessary by the Federal statute, (R. S. sec. 2324; 2 Comp. Stat.

p. 1426,) in order to keep possession of the mine. On June 19, 1878, one Evans was appointed special administrator of the estate of Wilsey, and his letters were subsequently revoked, and one Stevens was appointed and filed his bond as administrator on August 13, 1881. Subsequently, on an allegation of the death of Stevens, some time in 1888, the present administrator was appointed on the 12th of August, 1893.

In 1889, or soon thereafter, processes for the successful treatment of all mining ores, including such ore as was found in the ground in controversy, were introduced in Lawrence County, and as a consequence the value of the mining property therein was materially enhanced, and this property became of much greater value in August, 1892, and December, 1893, than at any time since its location.

On December 5, 1893, the plaintiffs in error by their attorneys served on the defendant company an offer in writing to pay $700 for annual development and assessment work, and if that was not the correct amount of the expense for protecting their half interest in the Golden Sand lode, then they offered to pay the full amount due for the protection of the half interest of the plaintiffs in error, and they asked for a receipt, and demanded a deed for such half interest. The offer and the request were refused, and this action was begun on December 6, 1893.

From the time of the location of the mine up to 1888, inclusive, Havens, the co-owner with Wilsey, did at least one hundred dollars' worth of labor each year in order to hold the claim, and filed on January 2, 1889, an affidavit to that effect, including the time from 1880 to and including the year 1887, and another affidavit to the same effect for the year 1888. Under the statute he published a notice directed to "Rufus Wilsey, his heirs, administrators, and to all whom it may concern," informing them that he had expended $800 in labor upon the mine for the years ending December 31, 1880, 1881, 1882, 1883, 1884, 1885, 1886 and 1887, and stating that if within ninety days after this notice by publication they failed to contribute their proportion, $400, being $50 for each of said years, their interest in said claim would become the property of the subscriber under section 2324 of the Revised Statutes of the United States. Havens also published for the year 1888 a notice similar to the one already given in regard to the work done prior to that year. The two notices were published in the proper newspaper and were set out in full and published in each daily issue of the paper, (every day in the week except Sunday,) beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889, and no more. Havens also continued during the years 1889, 1890, 1891, and 1892, to do at least $100 worth of work in the mine for the purpose of holding the same. On August 10, 1892, Havens made a deed of the whole lode and mining claim to one Thomas H. White, and on August 25, 1892, White caused to be filed for record an affidavit of Havens, which recited

that he was one of the locators of the Golden Sand lode and that Wilsey, his co-owner, and whom he advertised out for not contributing his proportion of labor, had not paid his proportion nor any of the expenditures for holding the claim.

Questions were made as to the sufficiency of the notices and as to the regularity of the publication of the same under the above statute of the United States. The case was tried once before and resulted in a judgment for plaintiffs, which was reversed by the Supreme Court of the State, (9 S. D. 636,) and upon the new trial the judgment was for the defendants. (15 S. D. 124.)

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

The Federal questions which arise in this case are based upon the statute of the United States already referred to in the foregoing statement of facts, being section 2324 of the Revised Statutes, the material portion of which is set forth in the margin.*

*R. S. Sec. 2324; 2 Comp. Stat. p. 1426.

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made each year. On all claims located prior to the tenth of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occured shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of one year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two.

The plaintiffs in error contend that the notices published by or in behalf of the defendants in error were not a compliance with the statute, because of the manner in which they were addressed. They also insist that, even assuming the sufficiency of the notices, they were not published in accordance with the requirements of the statute for a sufficient length of time, and that, therefore, the title of the plaintiffs in error was not divested. We are not impressed with the validity of either of the two objections.

As to the first. The notice was addressed as follows: "To Rufus Wilsey, his heirs, administrators, and to all whom it may concern." The objection made is that at the time when this notice was published, Rufus Wilsey was dead, and there was no administrator then existing and the names of the heirs were not given, and the notice, "to whom it may concern," was futile.

The statute, it will be observed, does not require that the published notice in regard to a deceased co-owner shall be directed to any one by name. Upon the failure of a co-owner to contribute his proportion of the expenditure required under the section, the co-owner who has performed the labor or made the improvements may, as provided for by the section, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, and if at the expiration of ninety days after such notice in writing, or by publication, the delinquent refuses to contribute his proportion or fails to do so, his interest in the claim thereby becomes the property of his co-owners who have made the required expenditures. We perceive no possible harm arising from the fact that the notice itself, containing all the facts necessary to be included therein, was addressed to "Rufus Wilsey, his heirs, administrators and to whom it may concern." The fact that Rufus Wilsey was dead was not material so far as to thereby render the notice to his heirs illegal or insufficient. It certainly did them no harm to include the name of Rufus Wilsey, and the notice was quite as likely to become known to them as if it had been addressed "to the heirs of Rufus Wilsey, deceased, his administrators, and to all whom it may concern." It is entirely unlike the publication of a summons for the purpose of commencing an action against a particular individual or individuals. There the identification must be complete and the person particularly described and named, so that when the publication has been finished it can be known that the particular individual has been served with process by publication with the same effect as if it had been personally served on the same individual without publication. This statute provides a summary method for the purpose of insuring the proper contribution of co-owners among themselves in the working of the mine, and it provides a means by which a delinquent co-owner may be compelled to contribute his share under the penalty of losing his right and title in the property because of

such failure. It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The act does not require it. If the notice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficent notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein by the payment of their share of the expenses of working the mine, or else to lose their right, title and interest therein. The co-owner who did the work might not know who the heirs were, and it might be impossible for him to learn their names or whereabouts, and the statute never contemplated that the man who did the work should be prevented from obtaining the benefit of the statute by his inability to learn who the heirs were and where they lived. A general address to the heirs of the person named, and the proper publication of the notice, is sufficient. It did not become insufficient because in addition to being addressed to them it was also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them.

The Supreme Court of South Dakota has held in this case that at the time this notice was published the title to a one-half interest in this claim was in the heirs, subject to a possible lien of the administrator for administration purposes, and had been since the death of Wilsey. (9 S. D. 636, 642.) The same court has held that an administrator has but a lien on real estate for administrative purposes, and that the title vests in the heirs. (Cases cited in opinion of the State court.) The only debt, so far as the record shows, existing against the estate of Wilsey was one for $50, in favor of Stevens, who was appointed administrator in 1881, and died in 1888, and from then until 1893 there was no administrator, the present one being appointed evidently for the purpose of this suit. The actual title to the fee is in the government, (*Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449,) but the interest of the miner may be conveyed and inherited. (Id. Id.) We are of opinion that the publication of the notice was sufficient, although there was no administrator at the time of publication. It is unnecessary under this statute to publish a notice to lienors. We agree with the Supreme Court of the State that the evident purpose and object of the law of 1872 (section 2324) were to encourage the exploration and development of the mineral lands of the United States and the sale of the same, and that all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off, though the failure to do the work may have been caused by the death of the locator or locators during the year. When a notice has been rightfully published under

the statute it becomes effective in cutting off the claims of all parties, and the title is thus kept clear and free from uncertainty and doubt.

There was no irregularity in grouping in one notice claims for more than one year's expenditures. We can perceive no reason why a consolidation of the claims of several years should not be made and included in one and the same notice.

(2.) The objection to the sufficiency of the publication of the notice we regard as equally unfounded. The statute provides for a publication "for at least once a week for ninety days." The publication was in fact made every day, except Sunday, in the proper newspaper, beginning Monday, January 7, 1889, and concluding Tuesday, April 2, 1889. And the statute provides that if, after the expiration of ninety days after such notice in writing or publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The publication, we think, was sufficient. The ninety day period begins with the first publication; in this case, Monday, January 7. The publication on that day was sufficient for the week then beginning. The publication on January 15 was sufficient for that week, and, as stated by the Supreme Court of South Dakota: "Each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7 to April 1, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1 until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6. Excluding the first day, ninety days ended on Sunday, April 7. On that day the required notice had continued during ninety days, and another publication on Monday, April 8, was wholly unnecessary."

We are satisfied that this construction is the correct one, and the publication was, therefore, made for a sufficient length of time to comply with the statute.

The judgment of the Supreme Court of South Dakota is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.